THE

MONTHLY LAW REPORTER.

JANUARY, 1853.

THE NEW HAMPSHIRE LIQUOR LAW.

At the June session of the New Hampshire Legislature, "An act for the suppression of drinking houses and tippling shops," substantially similar to what is known as the Maine Liquor Law, passed the House of Representatives, but was postponed in the Senate until the November session of the Legislature, and a resolution of the Senate was passed, referring the bill to the people, to be voted upon by yeas and nays on the day of the Presidential election. The returns show that the question was acted upon only in seventy-nine out of the two hundred and thirty towns in the State, and that in these towns, there were some ten thousand votes cast; and that the majority against the bill was upwards of fourteen hundred votes. By another resolution of the Senate, a copy of the bill was sent to the Justices of the Supreme Court, who were requested to give the Senate their "written opinion upon the constitutionality of the bill." In answer to this resolution, the Justices of the Superior Court, in November last, presented to the Senate their opinion, in which they point the attention of the Senate to those particulars which they "suppose may interfere with constitutional limitations, and which for that reason they presume the Legislature would wish to avoid." These particulars are eight in number, and we give them below in full.

Upon the general question of the constitutional right of the Legislature to pass laws regulating the sale of spirituous liquors, the Justices affirm the previous opinion of the court, the soundness of which they think "can admit of

no question," and they refer to the case of *State* v. *Pierce*, (13 N. H. Rep. 536,) as containing their opinions upon that subject. As is well known, this case settles the point in that State, that the Legislature has such a constitutional right. Upon the question referred to them by the resolution of the Senate, the Justices express the considerable embarrassment they feel because of the general terms in which the inquiry is made; and of the nature of the bill, which is of great length, and has "many new and untried provisions; and no person, from even a careful examination of it, could safely express an opinion that some parts of it, when they should be brought to the test of practical application, would not be found to be in conflict with the Constitution," and because they have not had the aid of arguments of counsel. "Upon these considerations," they say, "we feel it due to ourselves in justice to say, that whatever opinions we might express upon this bill, must be regarded as impressions by which we should not feel ourselves bound, if the bill should become a law, and if the rights of a citizen should depend on its construction." They also add at the conclusion of their opinion, "We have endeavored to state briefly the constitutional objections which seem to us to exist to the bill in its present condition. It is possible that our impressions might be modified upon further investigation; but some of the objections we have stated to the bill seem to us to be of the most serious character. We may have omitted some views which might be taken of the questions that will arise, but the foregoing opinion, embracing such matters as have occurred to us, is respectfully submitted to the Senate."

As we have said, the bill was substantially the same as the Maine Liquor Law. It enacts in its first section, that "No person shall be allowed at any time to manufacture or sell, by himself, his clerk, servant, or agent, directly or indirectly, any spirituous or intoxicating liquors, or any mixed liquors, a part of which is spirituous or intoxicating, except as hereafter provided." Provision was made for the appointment of a town agent, to sell "for medicinal, and mechanical purposes, and no other;" but in the copy of the bill before us, there is no section authorizing the licensing of manufacturers. The rest of the bill contains the details, which were probably designed to give it efficiency, and which have attracted the animadversion of the Justices.

With these remarks, we give the points made by the Justices, and subjoin in notes the clauses of the act, referred to by them, when necessary for explanation.

First. The language of the bill seems designed to confer upon Justices of the Peace an extent of authority not contemplated by the Constitution. Their jurisdiction is limited to actions wherein the sum demanded in damages does not exceed thirteen dollars and thirty-three cents. Constitution, Part 2, Sec. 77. The penalties imposed by this act are made recoverable by action of debt before a Justice, though the fines after the first offence must be twenty dollars. Sections 4 and 6.[1] The bill also authorizes Justices of the Peace to declare liquors seized for a violation of the law, to be forfeited, whatever may be their value, and this seems hardly consistent with the limited power intended to be conferred upon them by the Constitution. By limiting the extent of their jurisdiction, it would seem to be the intent of the Constitution, that for larger amounts the people should have the benefit of more stable and experienced tribunals, which aim to be regulated by more settled rules of law.

Second. No provision is made for a trial by jury before a Justice, or for an appeal and trial by jury before a Superior Court, or for any original proceeding in a higher court, in relation to liquors forfeited, though the value of the property may be hundreds or thousands of dollars. By the Constitution, Part 1, Sec. 20, it is provided that "In all controversies concerning property * * the parties have a right to a trial by jury," but for the exercise of this right the act makes no provision.

Third. The 17th sect. of the act contains provisions directly in conflict with the Constitution of the United States.[2] This section enacts that "all * * conveyances, mortgages, &c., which either in whole or in

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[1] Sect. 4. "If any person &c. shall sell &c. he shall forfeit and pay, on the first conviction, ten dollars and costs of prosecution, and stand committed until the same be paid; on the second conviction he shall pay a fine of twenty dollars and costs of prosecution, and shall be imprisoned in the common jail not less than thirty days nor more than sixty days; and for the third and every subsequent conviction he shall pay a fine of twenty dollars and costs of prosecution, and shall be imprisoned in the common jail not less than three months nor more than six months. * * * And two or more acts of violation of the provisions of this section may be alleged in the complaint, in separate counts, and tried at the same time; and conviction thereon, or on any of them, shall have the same effect upon the convicts or convict as if the proceedings had been upon separate complaints, and the trials had at different times, and said convictions shall be adjudged the second, third or other convictions, as the case may be, and judgment shall be rendered accordingly."

Sect. 6. "Any forfeiture or penalty arising under the foregoing sections may be recovered by an action of debt, or by complaint before any justice of the peace or judge of any municipal or police court in the county where the offence was committed."

[2] The 17th Sect. is in these words — "All payments or compensations for liquors sold in violation of law, whether in money, labor, or other property, either real or personal, shall be held and considered to have been received in violation of law and without consideration, and against law, equity, and a good conscience; and all sales, transfers and conveyances, mortgages, liens, attachments, pledges and securities of every kind, which either in whole or in part shall have been for on account of spirituous or intoxicating liquors, shall be utterly null and void against all persons, and in all cases, and no rights of any kind shall be acquired thereby; and in any action either at law or equity, touching such real or personal estate, the purchaser of such liquors may be a witness for either party. And no action of any kind shall be maintained in any court of this State either in whole or in part for intoxicating or spirituous liquors sold in any other State or country whatever, nor shall any action of any kind be had or maintained in any court in this State, for the recovery or possession of intoxicating or spirituous liquors or the value thereof."

part shall have been for or on account of spirituous or intoxicating liquors, shall be utterly null and void against all persons and in all cases," and "No action of any kind shall be maintained in any court in this State either in whole or in part for intoxicating or spirituous liquors sold in any other State or country whatever." By the 14th article of the Bill of Rights, it is declared that "Every subject of this State is entitled to a certain remedy by having recourse to the laws for all injuries he may receive in his person, property, or character." By the Constitution of the United States, Art. 4, Sec. 2, it is provided that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Now a refusal to pay a debt is an injury to the property of the creditor. The right to a remedy for such injury is secured to our citizens by the Bill of Rights, and the Constitution of the United States gives the same privilege to the citizens of the several States. But this act excludes all persons whomsoever from the remedy specified in the Bill of Rights. The lawfulness of a debt is determined by the law of the State or country where it is contracted, or where it is to be paid. A debt or contract legal and binding by the law of the country where it is to be paid or performed, and not made with a view to evade the statutes of any other State, is a debt and property everywhere, and no law of this State can deprive a citizen of the United States of the right to enforce it in our tribunals.

Fourth. The 17th sect. of the act also provides that no "action of any kind shall be had or maintained in any court of this State for the recovery or possession of intoxicating or spirituous liquors, or the value thereof." It seems impossible to reconcile this provision with the 14th article in the Bill of Rights, above referred to. Such liquors are property. The bill itself treats them as property. License is to be given to sell them for certain purposes. The rights of towns and mechanics to such as are kept in conformity to the bill are protected. Legislation cannot change the nature of things. That which was property in the second section of the bill,[1] and of which ownership may be predicated as well as of any other thing, cannot by force of a few phrases lose its peculiar character in the 17th section, and we think that persons injured in their property of this kind, are entitled to a remedy by recourse to the laws — that is, by an action.

Fifth. The bill designs to subject a party appealing from a judgment of conviction by a Justice of the Peace, to a double penalty, (sect. 7,) or to an increased penalty, (section 16,) if judgment be rendered against him in the court above.[2] The bill contemplates that proceedings may be commenced by action, indictment, or complaint, (section 11.) The Constitution of the United States, amendment 6, provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." Unless the right of appeal can be wholly taken

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[1] The provisions of the second section upon this point are — "The selectmen on the first Monday of April annually, or as soon thereafter as may be convenient, may appoint some suitable person as the agent of said town to sell, at some convenient place within said town, spirits, wines, or other intoxicating liquors, to be used for medicinal and mechanical purposes, and no other; and said agent shall receive such compensation as the board appointing may prescribe; and shall, in the sale of such liquors, conform to such rules and regulations as the selectmen as aforesaid shall prescribe for that purpose."

[2] Upon appeal, Sect. 2 provides that "In the event of a final conviction before a jury, the defendant shall suffer and pay double the amount of fines, penalties and imprisonment awarded against him by the justice or judge from whose judgment the appeal was made." And Sect. 16 enacts that "If on such appeal the verdict of the jury shall be against him, he shall, in addition to the penalty awarded by the lower court, pay a fine of twenty dollars."

away, and the party deprived of all right to a jury trial, by closing the only path by which it can be reached, this provision cannot be supported. It operates, in fact, as a penalty upon the party for claiming the appeal given him by the Constitution.

Sixth. The 33d art. of the Bill of Rights declares that excessive bail shall not be demanded. The 5th section of the bill before us enacts that "No person shall be surety, directly or indirectly, under the provisions of this act, in more than one case."[1] This provision seems hardly consistent with the constitutional prohibition against excessive bail. The act seems to regard exclusively the person who becomes bail, without considering his sufficiency, and to render it as difficult as possible for the accused to procure bail. If it had been added that the accused should not have the benefit of counsel to defend him, the parallel between the present bill and the practice in England in former days, would have been complete.

Seventh. It has been supposed that the provisions of the Constitutions of the U. States and of New Hampshire were intended, among other things, to secure an impartial trial to accused persons. The 6th amendment to the Constitution of the United States provides that the accused shall "be confronted with the witnesses against him." But the 5th section of the bill enacts that where the offence is committed on the premises of a person, by another person in his employment, proof of the commission of the offence by the agent shall be sufficient to convict the principal[1] Upon the trial, then, of the principal, it would be sufficient to prove that a person in his employ committed the offence on his premises, but it need not be shown that the principal directed it, or even knew of it. He is not confronted with the witnesses against him, but with those against a third person, whose crime is dexterously visited on his head. If his hired servant should commit a murder on his premises, the same principle would condemn the master to suffer the penalty. But this does not seem to be in accordance with the spirit of our Constitution, or of any code of laws known to civilized man.[2]

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[1] Sect. 5 was as follows — "In case of the alleged violation of the provisions of the fourth section of this act, by any clerk, servant, agent or other person, in the employment, or on the premises of another, the principal or principals, as well as the clerk, servant, agent or other person as aforesaid, may be charged jointly in the same complaint, and tried at the same time, and the proof of the commission of the offence by the clerk, servant, agent or other person as aforesaid, shall be sufficient to convict the principal or principals, as well as said clerk, servant, agent or other person, and judgment shall be rendered against each of them, and each of them shall be subject to incur the same punishment and in the same manner as if the proceedings had been against each of them separately; and no person shall be surety, directly or indirectly, under the provisions of this act, in more than one case. And any justice of the peace in any city or town may have jurisdiction of all cases arising under this act, which a justice court is competent to try, in the city, town or county in which he resides, notwithstanding the provisions of any other act, either special or general. And the delivery of any spirituous or intoxicating liquors in any shop, store or other building or place whatever, except a private dwelling-house, shall constitute a sale by the person delivering the same; and in any private dwelling-house, a delivery of such liquors, with payment or promise of payment, either before or after the delivery, shall constitute a sale by the person delivering the same; and all forfeitures or fines, bonds and recognisances arising under this act, shall go to the cities or towns where the offences were committed."

[2] The Supreme Court of Massachusetts have passed upon this question. In *Commonwealth* v. *Nichols* (10 Met. 262, 263), they use the following language: — "It seems to us that the case of a sale of liquors prohibited by law, at the shop or establishment of the principal, by an agent or servant usually employed in conducting his business, is one of that class in which the master may properly be charged criminally for the act of the servant. We think that a sale by the servant in the shop of the master, is only *primâ facie* evidence of such sale by the master as

Eight. The people have a right to be secure against all unreasonable searches of their houses, &c., and all search warrants must be under oath, &c. (Const. of the U. S., Amendment 4; Const. of N. H., Bill of Rights, sec. 19.) But by the 15th section of the bill, the information to the mayor, &c., need not be under oath; it may be verbal only; suspected places may be searched without a warrant, and liquors seized; persons may be arrested without any warrant, and carried before a justice, and if it be shown that the liquors were intoxicating, and were in the possession of the accused, he is to be imprisoned. The offence may consist in keeping the liquors in any place for selling refreshments, whether they are intended for sale or not. It seems difficult to reconcile all the provisions of this section with the Constitution.

Recent American Decisions.

Superior Court of New York, November, 1852.

THE PEOPLE EX RELATIONE LOUIS NAPOLEON *v.* JONATHAN LEMMON.

Habeas Corpus — The right of Masters to their Slaves, when necessarily passing through a Free State with them, in transit from one Slave State to another, discussed and denied.

L., a resident of Virginia, a slaveholding State, and the lawful owner of slaves therein, intending to remove with his slaves to Texas, another slaveholding State, proceeded by water with the said slaves from Virginia to New York, a non-slaveholding State, with the intention of taking a steamer at New York and going therein with his slaves to Texas, and without intending to remain in New York longer than was necessary for said purpose. A writ of *habeas corpus* was served upon the respondent in New York, and the above facts appearing upon the return thereto, it was *held*, that thereby the slaves, by the law of New York, were made free, and that neither the Constitution of the United States, nor the law of nature or nations, sustained the alleged right of the owner to hold the parties as slaves in New York.

THE facts of the case sufficiently appear in the opinion of the court, which was delivered by

PAINE, J. — This case comes before me upon a writ of habeas corpus, issued to the respondent, requiring him to have the bodies of eight colored persons, lately taken from the steamer City of Richmond, and now confined in a house in this city, before me, together with the cause of their imprisonment and detention.

The respondent has returned to this writ, that said eight

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would subject him to the penalty for violating the statute forbidding the sale of spirituous liquor without license; that the relation of these parties, the fact that the defendant was in possession of the shop and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. But we cannot say that no possible case can arise in which the inference from all these facts may not be rebutted by other proof. Unexplained they would be sufficient to convict the party."

colored persons are the property of his wife, Juliet Lemmon, who has been their owner for several years past, she being a resident of Virginia, a slaveholding State, and that by the Constitution and laws of that State they have been, and still are, bound to her service as slaves; that she is now, with her said slaves or property, *in transitu* from Virginia to Texas another slaveholding State, and by the Constitution and laws of which she would be entitled to said slaves and to their service; that she never had any intention of bringing, and did not bring them into the State to remain or reside, but was passing through the harbor of New York, on her way from Virginia to Texas, when she was compelled by necessity to touch or land, without intending to remain longer than was necessary. And she insists that said persons are not free, but are slaves as aforesaid, and that she is entitled to their possession and custody.

To this return, the relator has put in a general demurrer.

I certainly supposed, when this case was first presented to me, that, as there could be no dispute about the facts, there would be no delay or difficulty in disposing of it. But, upon the argument, the counsel for the respondent cited several cases which satisfied me that this case could not be decided until those had been carefully examined.

The principle which those cases tend more or less forcibly to sustain, is, that if an owner of slaves is merely passing from home with them, through a free State, into another slave State, without any intention of remaining, the slaves while in such free State will not be allowed to assert their freedom. As that is precisely the state of facts constituting this case, it becomes necessary to inquire whether the doctrine of those cases can be maintained upon general principles, and whether the law of this State does not differ from the laws of those States where the decisions were made.

I shall first consider whether those cases can be sustained upon general principles.

The first case of the kind which occurred was that of *Sewall's Slaves*, which was decided in Indiana, in 1829, by Judge Morris, (3 Am. Jurist, 404.) The return to the habeas corpus stated that Sewall resided in Virginia, and owned and held the slaves under the laws of that State; that he was emigrating with them to Missouri, and on his way was passing through Indiana, when he was served with the habeas corpus.

It, however, appeared on the hearing that Sewall was not going to Missouri to reside, but to Illinois, a State whose laws do not allow of slavery. The Judge for this reason discharged the slaves. This case, therefore, is not in point, and would be entirely irrelevant to the present, were it not for a portion of the Judge's opinion, which was not called for by the case before him, but applies directly to the case now before me.

"By the law," he says, "of nature and of nations, (Vattel, 160,) and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the States of this Federal Republic, I have no doubt but the citizen of a slave State has a right to pass upon business or pleasure, through any of the States attended by his slaves or servants; and while he retains the character and rights of a citizen of a slave State, his right to retain his slaves would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free State, should be considered as an escape from the State where the master had a right of citizenship, and by the laws of which the service of the slave was due. The emigrant from one State to another might be considered prospectively as the citizen or resident of the State to which he was removing; and should be protected in the enjoyment of those rights he acquired in the State from which he emigrated, and which are recognised and protected by the laws of the State to which he is going. But this right I conceive cannot be derived from any provision of positive law."

The next case relied upon is *Willard* v. *The People*, (4 Scammon's Rep. 461,) and which was decided in the State of Illinois in 1843. It was an indictment for secreting a woman of color, owing service to a resident of Louisiana. The indictment was under the 149th section of the Criminal Code, which provides that —

"If any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or a servant owing service or labor to any other persons, whether they reside in this State or any other State, or Territory or District, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every such person so offending shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

It appears that the woman of color was a slave, owned by a resident of Louisiana, and that, while passing with her mistress from Kentucky to Louisiana through the State of Illinois, she made her escape in the latter State, and was secreted by the defendant. There were several questions raised in the case which it is unnecessary now to notice. The indictment, which was demurred to, was sustained by the court. The main objection to it was the section of the

code under which it was found, was a violation of the sixth article of the Constitution of the State of Illinois, which declares that "Neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

The court in answering this objection, say: —

"The only question, therefore, is the right of transit with a slave; for if the slave upon entering our territory, although for a mere transit to another State, becomes free under the Constitution, then the defendant in error is not guilty of concealing such a person as is described in the law and in the indictment. The 149th section of the Criminal Code, for a violation of which the plaintiff is indicted, does most distinctly recognise the existence of the institution of slavery in some of these United States, and whether the Constitution and laws of this State have or have not provided adequate remedies to enforce within its jurisdiction that obligation of service, it has provided by this penal sanction, that none shall harbor or conceal a slave within this State, who owes such service out of it. Every State or Government may or may not, as it chooses, recognise and enforce this law of comity. And to this extent this State has expressly done so. If we should, therefore, regard ourselves as a distinct and separate nation from our sister States, still as by the law of nations, (Vattel, B. 2, ch. 10, sec. 132, 133, 134.) the citizens of one government have the right of passage through the territory of another peaceably, for business or pleasure, and that too without the latter's acquiring any right over the person or property, (Vattel, B. 2, sec. 107, 109.) we could not deny them this international right without a violation of our duty. Much less could we disregard their constitutional right, as citizens of one of the States, to all the rights, immunities and privileges of citizens of the several States. It would be startling indeed if we should deny our neighbors and kindred that common right of free and safe passage which foreign nations would hardly dare deny. The recognition of this right is no violation of our Constitution. It is not an introduction of slavery into this State, as was contended in argument, and the slave does not become free by the Constitution of Illinois by coming into the State for the mere purpose of passage through it."

Another case cited by the respondent's counsel was the *Commonwealth* v. *Aves*, (18 Pick. 193.) In this case, the owner brought her slave with her from New Orleans to Boston, on a visit to her father, with whom she intended to spend five or six months, and then return with the slave to New Orleans. The slave being brought up on habeas corpus, the court ordered her discharge. The case was fully argued, and Chief Justice Shaw closes a very elaborate opinion with these words: "Nor do we give any opinion upon the case, where an owner of a slave in one State is *bonâ fide* removing to another State where slavery is allowed, and in so doing necessarily passes through a free State, or where by accident or necessity he is compelled to

touch or land therein, remaining no longer than necessary."

I have quoted largely from the opinions in these cases, in order that it may be understood clearly what is presented by them as their governing principle. The respondent's counsel insists it is this: That by the law of nations, an owner of a slave may, either from necessity or in the absence of all intention to remain, pass with such slave through a State, where slavery is not legalized, on his way from one slave State to another, and that during such transit through the free State the slave cannot assert his freedom. I admit that this is the principle of these cases, and I now propose to consider it. Each case denies that the right of transit can be derived from the provision of the Constitution of the United States respecting fugitive slaves, and where an opinion was expressed, places the right upon the law of nations.

Writers of the highest authority on the law of nations agree that strangers have a right to pass with their property through the territories of a nation. (Vattel, B. 2, ch. 9, sec. 123 to 136; Puffendorf, B. 3, ch. 3, sec. 5 to 10.) And this right, which exists by nature between States wholly foreign to each other, undoubtedly exists, at least as a natural right, between the States which compose our Union.

But we are to look further than this, and to see what the law of nations is when the property which a stranger wishes to take with him is a slave. The property which the writers on the law of nations speak of is merchandise or inanimate things. And by the law of nature these belong to their owner. But those writers nowhere speak of a right to pass through a foreign country with slaves as property. On the contrary they all agree, that by the law of nature alone no one can have a property in slaves. And they also hold that, even where slavery is established by the local law, a man cannot have that full and absolute property in a person which he may have in an inanimate thing. (Puffendorf, B 6, ch. 3, sec. 7.) It can scarcely, therefore, be said, that when the writers on the law of nations maintain that strangers have a right to pass through a country with their merchandise or property, they thereby maintain their right to pass with their slaves.

But the property or merchandise spoken of by writers on the law of nations which the stranger may take with him, being mere inanimate things, can have no rights; and the

rights of the owner are all that can be thought of. It is, therefore, necessary to look still further and to see what is the state of things, by the law of nature, as affecting the rights of the slave when an owner finds himself, from necessity, with his slave in a country where slavery is not legalized or is not upheld by law.

It is generally supposed that freedom of the soil from slavery is the boast of the common law of England, and that a great truth was brought to light in Sommersett's case. This is not so. Lord Mansfield was by no means, so far as the rest of the world is concerned, the pioneer of freedom. Whatever honor there may be in having first asserted that slavery cannot exist by the law of nature, but only by force of local law, that honor among modern nations belongs to France, and among systems of jurisprudence to the Civil Law. The case of Sommersett did not occur until the year 1772, and in 1738 a case arose in France in which it was held that a negro slave became free by being brought into France. (13 Cause Celebres, 59.) But in truth the discovery that by nature all men are free, belongs neither to England nor France, but is as old as ancient Rome; and the law of Rome repeatedly asserts that all men by nature are free, and that slavery can subsist only by the laws of the State. (Digests, B. 1, T. 1, sec. 4; B. 1, T. 5, sec. 4, 5.)

The writers on the law of nations uniformly maintain the same principle, viz.: that by the law of nature all men are free, and that where slavery is not established and upheld by the law of the State, there can be no slaves. (Grotius, B. 2, ch. 22, sec. 11. Hobbes' De Cive, B. 1, ch. 1, sec. 3. Puffendorf, [Barbeyrac,] Droit de la Nature, B. 3, ch. 2, sec. 1, 2, B. 6, ch. 3, sec. 2.) The same writers also hold that by the law of nature one race of men is no more subject to be reduced to slavery than other races. (Puffendorf, B. 3, ch. 2, sec. 8.)

When we are considering a master and slave in a free State where slavery is not upheld by law, we must take into view all these principles of the law of nature, and see how they are respectively to be dealt with according to that law; for it will be remembered that the master can now claim nothing except by virtue of the law of nature. He claims under that law a right to pass through the country. That is awarded to him. But he claims in addition to take his slave with him; but upon what ground? That the

slave is his property. By the same law, however, under which he himself claims, that cannot be; for the law of nature says that there can be no property in a slave.

We must look still further, to see what is to be done with the claims of the slave. There being now no law but the law of nature, the slave must have all his rights under that, as well as the master; and it is just as much the slave's right under that to be free as it is the master's to pass through the country. It is very clear, therefore, that the slave has a right to his freedom, and that the master cannot have a right to take him with him. As the cases cited by the respondent's counsel all rest the master's right of transit exclusively upon the law of nations, and admit that he cannot have it under any other law, I have thus followed out that view, perhaps at unnecessary length, in order to see to what it would lead. In order to prevent any misapprehension as to the identity of the law of nature and the law of nations, I will close my observations upon this part of the case with a citation upon that point, from Vattel. (Preliminaries, sec. 6.) "The law of nations is originally no more than the law of nature applied to nations."

I ought also to notice here that the respondent's counsel upon the authority of the case in Illinois, insisted that this right of transit with slaves, is strengthened by that clause in the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The case in Indiana, on the other hand, says expressly that the right does not depend upon any positive law.

I think this remark must have found its way into the opinion of the Judge who decided the Illinois case, without due consideration. I have always understood that provision of the Constitution to mean, (at least so far as this case is concerned,) that a citizen who was absent from his own State, and in some other State, was entitled while there to all the privileges of the citizen of that State. And I have never heard of any other or different meaning being given to it. It would be absurd to say, that while in the sister State he is entitled to all privileges secured to citizens by the laws of all the several States or even of his own State, for that would be to confound all territorial limits, and give to the States, not only an entire community, but a perfect confusion of laws. If I am right in this view of the

matter, the clause in the Constitution relied upon cannot help the respondent; for if he is entitled while here to those privileges only which the citizens of this State possess, he cannot hold his slaves.

I must also here notice some other similar grounds insisted upon by the respondent's counsel. He cites Vattel (B. 2, ch. 8, sec. 81) to prove that the goods of an individual as regards other States are the goods of his State. I have already shown that by the law of nature, about which alone Vattel is always speaking, slaves are not goods; and I may add, that what Vattel says in the passage to which he refers has no connection with the right of transit through a foreign country. Besides, in the case from Illinois referred to by respondent's counsel, the court distinctly declare, (*Willard* v. *People*, 4 Scammon's Rep. 471,) that they cannot see the application to this case of the law of nations in relation to the domicil of the owner, fixing the condition of and securing the right of property in this slave, and regarding the slave as a part of the wealth of Louisiana, and our obligation of comity to respect and enforce that right.

The respondent's counsel also refers to those provisions of the Constitution of the United States which relate to fugitive slaves and to the regulation of commerce among the several States. With regard to the first of the provisions, which the counsel insists recognises and gives a property in slaves, it is sufficient to say, that although the supreme law of the land in respect to fugitive slaves, and as such entitled to unquestioning obedience from all, it is, so far as every thing else is concerned, the same as if there were no such provision in the Constitution. This has been so held in cases almost without number, and is held in each of the three cases cited by the respondent's counsel, and upon which I have before commented.

As for the provision of the Constitution in relation to commerce among the States, it has been often held, that notwithstanding this provision, the States have the power impliedly reserved to them of passing all such laws as may be necessary to the preservation, within the State, of health, order and the well-being of society, or laws which are usually called sanative and police regulations. (*Passenger cases*, 7 Howard S. C. R. 283; *License cases*, 5 Ib. 504; *Blackbird Creek Marsh Company*, 2 Peters, 250; *New York* v. *Miln*, 11 Peters, 130; *Brown* v. *State of*

Maryland, 12 Wheat. 419 ; *Groves* v. *Slaughter*, 15 Peters, 511.) Laws regulating or entirely abolishing slavery, or forbidding the bringing of slaves into a State, belong to this class of laws, and a right to pass those laws is not affected by the Constitution of the United States. This view of the subject is taken by the three cases upon which the counsel mainly relies. And even if all this were not so, I apprehend that the Constitution having undertaken to regulate both external and internal commerce in slaves, by certain distinct and specific provisions, (viz. those in relation to the importation of slaves from abroad, and the return of fugitive slaves,) has thereby taken the element of slavery out of these general provisions in relation to commerce, and having legislated separately upon the subject of slavery to a very limited extent and there stopped, has thereby shown its intention to dispose separately and completely of that subject, so far as it was to be disposed of, and has not left to Congress any power over it under the general provisions relating to commerce. For under any other view of the subject, the provisions in relation to the importation of slaves and to fugitive slaves would be entirely superfluous. If the Constitution had intended to give Congress power over slavery by the general provision in relation to commerce, that provision is of itself quite sufficient, by its letter or terms, to enable Congress to do all that they are specially empowered to do by the clauses expressly relating to slavery ; and as an express power takes away a power which might otherwise be tacitly implied, I think it has clearly done so in this instance.

It remains for me to consider how far the local law of New York affects this case, and distinguishes it from the cases in Indiana and Illinois. To go back, first, to the right of transit with slaves, as it is claimed to exist by the natural law. It appears to be settled in the law of nations that a right to transit with property not only exists, but that, where such right grows out of a necessity created by the *vis major*, it is a perfect right, and cannot be lawfully refused to a stranger. (Vattel, B. 2, ch. 9, sec. 123 ; Ib. Preliminaries, sec. 17 ; Puffendorf, B. 3, ch. 3, sec. 9.) In this case it is insisted that the respondent came here with his slaves from necessity, the return having so stated, and the demurrer admitting that statement. It is perfectly true that the demurrer admits whatever is well pleaded in the

return. But if the return intended to state a necessity created by the *vis major*, it has pleaded it badly; for it only alleges a necessity, without saying what kind of necessity; and, as it does not allege a necessity created by the *vis major*, the demurrer has not admitted any such necessity. Where the right of transit does not spring from the *vis major*, the same writers agree that it may be lawfully refused. (Ib.) But, however this may be, it is well settled in this country, and so far as I know, has not heretofore been disputed, that a State may rightfully pass laws, if it chooses to do so, forbidding the entrance or bringing of slaves into its territory. This is so held even by each of the three cases upon which the respondent's counsel relies. *Commonwealth* v. *Ayres*, (18 Pick. R. 221); *Willard* v. *The People*, (4 Scam. R. 471); *Case of Sewall's Slaves*, (3 Am. Jurist, 404.)

The laws of the State of New York upon this subject appear to me to be entirely free from any uncertainty. In my opinion they not only do not uphold or legalize a property in slaves within the limits of the State, but they render it impossible that such property should exist within those limits, except in the single instance of fugitives from labor under the Constitution of the United States. The Revised Statutes (vol. 1, 656, 1st ed.) re-enacting the law of 1817, provide that "No person held as a slave shall be imported, introduced, or brought into this State, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave, who hath been introduced or brought into this State contrary to the laws in force at the time, shall be free." (Sect. 1.)

The cases excepted by this section are provided for in the six succeeding sections. The 2d section excepts fugitives under the Constitution of the United States; the 3d, 4th, and 5th sections, except certain slaves belonging to immigrants, who may continue to be held as apprentices; the 7th section provides that families coming here to reside temporarily, may bring with them and take away their slaves; and the 6th section contains the following provision: —

"Any person not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held by him in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or

continue in this State more than nine months; and if such residence be continued beyond that time, such person shall be free."

Such was and had always been the law of this State, down to the year 1841. The Legislature of that year passed an act amending the Revised Statutes, in the following words, viz.: "The 3d, 4th, 5th, 6th and 7th sections of Title 7, Ch. 20, of the 1st part of the Revised Statutes, are hereby repealed."

The 6th section of the Revised Statutes, and that alone, contained an exception which would have saved the slaves of the respondent from the operation of the 1st section. The Legislature, by repealing that section, and leaving the 1st in full force, have, as regards the rights of these people and of their master, made them absolutely free; and that not merely by the legal effect of the repealing statute, but by the clear and deliberate intention of the Legislature. It is impossible to make this more clear than it is by the mere language and evident objects of the two acts.

It was, however, insisted on the argument that the words "imported, introduced, or brought into this State," in the 1st section of the Revised Statutes, meant only "introduced or brought" for the purpose of remaining here. So they did undoubtedly when the Revised Statutes were passed, for an express exception followed in the 6th section giving that meaning to the 1st. And when the Legislature afterward repealed the 6th section, they entirely removed that meaning, leaving the 1st section, and intending to leave it, to mean what its own explicit and unreserved and unqualified language imports.

Not thinking myself called upon to treat this case as a casuist or legislator, I have endeavored simply to discharge my duty as a judge, in interpreting and applying the laws as I find them. Did not the law seem to me so clear, I might feel greater regret that I have been obliged to dispose so hastily of a case involving such important consequences.

My judgment is, that the eight colored persons mentioned in the writ be discharged.

Supreme Judicial Court of Massachusetts, Suffolk, ss., November Term, 1852.

WILLIAM PRESCOTT, JR. *v.* WILLIAM ELMS.

Forcible Entry and Detainer — Tenancy at Will — Notice to Quit.

In a tenancy at will, where the rent is payable monthly, in order to determine the tenancy, a months' notice must be given to quit at the expiration of a month from the day when the rent is payable.

Unless a month's notice is given to quit at the expiration of a month from the day when the rent is payable, the notice is insufficient.

THIS was an action under the statute respecting forcible entry and detainer, to recover possession of a parcel of land, with a dwelling-house upon the same, in East Boston.

There was evidence tending to show that the defendant was a tenant of the plaintiff, and that the rent was payable monthly, but no evidence was offered by either party to show on what day of the month it became due. It was proved that on the 21st day of September, 1848, (the defendant being then tenant,) the plaintiff gave him due notice in writing to quit the premises. The plaintiff relied upon said notice, and not on any evidence of non-payment of rent.

Upon this evidence, the defendant, admitting that a month's notice was sufficient, requested the court to rule that, as the action was commenced on the 26th day of October, 1848, the notice was insufficient; because, as the defendant said, it should appear that the notice covered an entire period intervening between the times of paying rent, *i. e.*, if the rent was payable on the first day of each month, and notice was given on the 21st of September, the tenant was under no obligation to remove, and the plaintiff could not commence his action until the first day of November.

The court declined so to rule, but instructed the jury, that if the rent was payable monthly, and a month's notice to quit was given, it was sufficient. The defendant excepted to the ruling.

METCALF, J., delivered the opinion of the court. — A question is now raised, for the first time, as to the construction of that part of section 26 of chapter 60 of the Revised Statutes, which provides that an estate at will, when the rent reserved is payable at periods of less than three months, may be determined by either party, by a notice in writing, if the time of such notice be equal to the interval between the days of payment. That interval, in

the present case, was one month; but whether the times of payment were the first or some other day of each month, does not appear. The notice to the defendant to quit was given on the 21st day of September, 1848, and this action was commenced on the 24th day of October following. The notice, therefore, was within the letter of the statute — that is, the defendant had a month's notice. The question is, whether the notice ought not to have been to quit at the expiration of a month from the day when the rent was payable. And we are of opinion that it ought to have been.

The reasons for our opinion are these: — Before the passing of Statute 1825, ch. 89, which contained a provision like that in Rev. Stat. ch. 20, sec. 26, which we are now considering, the law concerning the right of tenants at will, and their landlords to notice, in order to determine the tenancy, was extremely doubtful. Some of the judges of this court held that such tenants and their landlords should have the same rights, and be held to the same duties here, which pertained to them, and bound them, by the law of England. The other judges held that the English law was not in force here, and that the landlord might terminate the tenancy without notice to the tenant, and that the tenant had only a right to a reasonable time, after such termination of his tenancy, to remove his effects; and that it was to be decided by the court, as a question of law, in each case, what was a reasonable time for removal of the tenant. See *Howard* v. *Merriam*, (5 Cush. 570–572.) The Statute of 1825 was intended to remove these doubts, and to adopt the principle of the English common law, except in cases of a tenant's refusal or neglect to pay rent due. That law not only requires that written notice shall be given, in order to terminate a tenancy at will, but also prescribes the length of the notice, in all cases except those in which the parties, either by express stipulation, or by agreement implied from custom, have otherwise contracted. In tenancies from year to year, (so called) six months' notice is required. In a tenancy for less than a year, as for a quarter, a month, or a week, the length of the notice is regulated by the letting; that is, a quarter's, a month's, or a week's notice must be given. But the expiration of the notice must be with the expiration of the quarter, month, or week. A notice to quit, which breaks into the quarter, month or week, is not a good notice. (Comyn on Land.

and Ten. 269.) So when parties to a written lease of premises from one year, or other period, to another, expressly agree that the tenancy may be terminated by a notice of shorter length than the law would otherwise require, that notice, in order to be valid, must expire with the year or other period. *Doe* v. *Donovan*, (1 Taunt. 555.) And it has been recently held in this Commonwealth, *Baker* v. *Adams*, (5 Cush. 99,) that where there was a provision, in a written lease for five years, that either party might terminate it by giving the other party six months' notice, the notice must be given so as to expire at the end of a year of the term.

The statute of 1825, ch. 89, sec. 4, which, as already has been said, enacted the principle of the common law of England, except as to tenants who do not pay rent due, was passed at the next session of the Legislature held after the publication of the case of *Coffin* v. *Lunt*, (2 Pick. 70,) and the note appended thereto, which left it doubtful whether by our law a tenant at will was entitled to notice to quit. By that statute, which is re-enacted, so far as it respects tenants at will, by the Rev. Statutes, ch. 60, sec. 26, it was provided that three months' written notice, given by either party to the other, should be sufficient in all cases; and that when the rent reserved should be payable at periods of less than three months, a notice equal to the interval between the times of payment should be sufficient. Thus the Legislature have expressly enacted that the length of the notice, which is required by the common law of England, shall be sufficient, when rent is payable oftener than quarterly, without expressly enacting at what time the notice shall expire, or what shall be the form of such notice. But we are of opinion that both the form of the notice, and the time when the tenant is to quit, are alike to be decided by the rules of the common law. It is an established rule in the construction of statutes, that when the Legislature employ a term which has a well known definite sense, at the common law, that term shall be expounded and received in the same sense in which it is understood at the common law, (11 Mod. 150; 2 Dwarris on Statutes, 696.) This rule of construction is constantly resorted to, in construing the Revised Statutes; and unless by constant resort to it, very many of the provisions of those statutes could never take effect. In the case now before us, the rule of the common law especially commends itself to our

adoption for its certainty, convenience, and justice. It saves all questions of the apportionment of rent, and gives the landlord neither more nor less, in any case, than for the time of the tenant's occupation. Upon the construction of the statutes, for which the plaintiff contends, the landlord or the tenant must always be a loser, when the tenancy is terminated in the middle of the term. (2 Salk. 413.)

Defendant's exceptions sustained, and a new trial ordered in the Court of Common Pleas.

S. C. Maine, for the plaintiff.

D. Morgan, for the defendant.

Court of Common Pleas, (Massachusetts,) Bristol County, September Term, 1852.

Before Judge Byington.

Cyrus Lothrop *v.* Susannah Snell and the County of Bristol, Trustee.

Trustee Process. Witness fees, in the hands of the county treasurer, for attendance as a witness upon the hearing of an indictment, are not subject to the trustee process.

The only question here was, the liability to be charged as trustee on the following facts. The principal defendant had been a witness for the Commonwealth, on an indictment pending in Bristol county, the fees for which had been taxed and allowed at twenty-two dollars, and were in the county treasurer's hands at the time of the service of the trustee process, ready to be paid to the principal defendant. The county claimed that it was not chargeable as trustee, on the ground that criminal costs were to be paid by the Commonwealth, and the county was but the disbursing agent for the State; and moreover that if this were not so, yet the case was not within the spirit and meaning of the statute. The court sustained this view, and ordered the trustees to be discharged with their costs.

Cyrus Lothrop, for plaintiff.

Bennett & Williams, for defendant.

COMMONWEALTH *v.* CERTAIN INTOXICATING LIQUORS, JOSHUA DEAN, CLAIMANT.

A complaint alleging that spirituous &c. liquors are kept and intended for sale, and which does not allege where they are intended to be sold, was held insufficient.

THIS was a complaint under sec. 14 of the liquor law, praying for a warrant of search and seizure. The complaint was made to the Police Court of Taunton, and was signed by three legal voters of Taunton. It charged "That they have reason to believe, and do believe, that spirituous and intoxicating liquors are kept and deposited and intended for sale by Joshua Dean, of said Taunton, he the said Dean not being authorized under the provisions of an Act concerning the manufacture and sale of spirituous or intoxicating liquors, approved on the 27th day of March, A. D. 1852, to sell the same in said Taunton, in a certain store and shop and building in said Taunton, occupied by said Dean, and being in and under Crandell's block, so called, in said Taunton." Upon this complaint a warrant was issued by the Police Court, and said Dean was summoned in as owner or keeper. He appeared before the Police Court, and denying that he was owner or keeper of said liquors, stated that he was simply the storer of them. The Police Court adjudged the liquors forfeited, and sentenced Dean to pay a fine of twenty dollars and costs. Dean appealed, and in the Court of Common Pleas moved that the complaint be quashed, because, among other reasons, it did not allege that said liquors were intended for sale in Taunton, and cited 15 Law Reporter, 193, August, 1852.

The court adjudged the complaint insufficient, and quashed it.

Morton and *Sanford*, for Dean.

H. Pratt, District-Attorney, for the Commonwealth.

Supreme Court of Vermont, Rutland County, February Term, 1852.

RUFUS GOSS *v.* ASA E. WHITNEY.

A promissory note made on Sunday, but not delivered until some other day, is valid.

What constitutes a delivery.

This was an action of assumpsit on a note given to Franklin B. Goss or bearer, and the plaintiff declared upon the note, as bearer.

It appeared on the trial, that one Benjamin N. Whitney was indebted to the said F. B. Goss for some sheep, and that on the day before that on which the note is dated, the said Goss and Whitney were together, and had some negotiation about said Whitney's indebtedness to Goss, but nothing was concluded; that on the day of the date of the note, which was upon the Sabbath day, the said Goss was at the house of Sylvester Segar, and Whitney came there, and some conversation was had about said indebtedness, and Whitney wanted Goss to take a horse for the debt, which Goss declined to take. Goss then asked Whitney if he would do as he had agreed, and Whitney replied that he would. Thereupon Goss asked for pen, ink and paper, and wrote the note given in evidence, and told said Whitney to get the note signed by the defendant, (who was not present, but about three miles from Segar's,) and leave it, on the same day, at the house of Towle, where he, Goss, could get the note, as he the said Goss expected to go by Towle's house that evening. It further appeared, that said Whitney took the note, and on the same day carried it to the defendant, and the defendant signed the note and delivered it to the said Benjamin N. Whitney, who carried the note on the same day to the said Towle, and delivered it to Towle, and directed Towle to deliver the note to Goss, provided Goss left with him a discharge of said Goss's claim against him, the said Whitney. It further appeared, that Goss called upon Towle the next Monday or Tuesday after the date of the note, and delivered Towle a discharge of his claim against Whitney, and took the note. It further appeared, that Towle afterwards delivered to Benj. N. Whitney the discharge executed by Goss.

Upon the above facts found by the County Court, the court decided that the plaintiff could not recover, and rendered judgment for the defendant; to which decision of the court the plaintiff excepted, and the case was carried to the Supreme Court, in which the opinion of the court was delivered by

Redfield, J. — It is settled by the case of *Lovejoy* v. *Whipple*, (18 Vt. Rep. 379,) that a promissory note written and signed on Sunday, will not on that account be void, if

not delivered until some other day. It is therefore not necessary farther to discuss that question.

The only inquiry into the present case, then, is, whether this note was delivered upon Sunday. We cannot regard Benjamin N. Whitney as the agent of Franklin B. Goss, in procuring the defendant to sign the note, or in receiving it, and carrying it to Towle. In all this he must be regarded as a principal, acting solely upon his own responsibility. The note was entrusted to him, by the defendant, to do with it precisely as he chose. It would not therefore become a binding contract upon the defendant, until delivered by the principal, Benjamin N. Whitney. And his delivery of the note must be regarded precisely in the same light, as if the note were signed by himself, either alone, or jointly with the defendant. He might deliver it absolutely to Towle, to take effect presently as a promissory note, and in that case it would no doubt have been regarded, as having been delivered to Franklin B. Goss upon Sunday. But he might also annex conditions to the delivery and make Towle his agent to see that these conditions were complied with, and in that case, the delivery would not become complete, until these conditions were fully complied with. That was the case here. And the note was not to go into the control of Franklin B. Goss, until he delivered a discharge of his claim against Whitney. This was the only condition, and the sole consideration upon which the note was to take effect. Thus it will appear very obvious, that neither the consideration of the note, nor the title of the note passed, until Monday or Tuesday after the Sunday upon which the note was written and signed. This alone would constitute the delivery of the note as a binding contract. The note therefore could not be regarded as a contract fully executed upon Sunday, and is not therefore void, by reason of any provision of law upon that subject.

It will doubtless be borne in mind, that the restriction which Benjamin N. Whitney put upon the delivery of the note to Franklin B. Goss, was, under the circumstances, a very important one. Ordinarily the delivery of a note, to be received in payment of a pre-existing debt, would operate *ipso facto* to discharge the debt; but in the present case, if delivered upon Sunday, it would not have that effect, so that the formal discharge of the debt, upon some other day, formed a very important consideration of the note, and

shows very clearly that the note to effect the purpose of the parties, either as to the note, or the pre-existing debt, must be regarded as taking effect at the time the discharge of the debt was exchanged for the note, with Towle, according to the direction of Benjamin N. Whitney, Towle acting as the mutual agent of both parties.

Orleans County Supreme Court, April Term, 1852.

GAMALIEL WASHBURN *v.* CURTIS PHELPS.

Bail — Privilege from Arrest — Waiver.

When a party privileged from arrest, is arrested, he may, within the discretion of the court where the suit is pending either against the principal or the bail, plead his privilege, and enter an *exoneratur* on the bail bond, or discharge the bail on his own motion.

When the *exoneratur* is entered on the bail bond, or the bail is discharged, it is conclusive upon the parties and all interested.

Giving bail is not a waiver of the privilege from arrest.

THIS case having been argued, at the April term, by Mr. Sumner for the plaintiff, and Mr. Colby for defendant, was held under advisement, until the Circuit Session, at Montpelier, in October, when the opinion, in which the facts sufficiently appear, was delivered by

REDFIELD, J. — This is a *scire facias* against the defendant, as bail for one Sanford Kinney, in a suit brought originally in a Justice's Court, by the present plaintiff against Kinney. Kinney not being an inhabitant of the State, was sued by arresting his body, and requiring special bail. The arrest was made while Kinney was attending court, as a witness, and was privileged from arrest.

At the return day of the writ before the justice, Kinney interposed an *exoneratur* on the bail bond, in favor of the present defendant, which motion was overruled by the justice, and the case went into the County Court, by appeal. The motion was renewed before the County Court, and that court allowed the motion, and ordered the *exoneratur* entered. To this decision the present plaintiff filed exceptions, and removed the case into this Court, where the exceptions were dismissed, on the ground that if the County Court had any power to entertain the motion, their decision, resting in discretion, must be conclusive, both of the fact and the law, as between the same parties, and the actual entry of the *exoneratur* placed the question beyond the revision of this Court; and if they had no

jurisdiction of the question, their decision was merely nugatory, and required no reversal.

Thereupon the plaintiff brought the present suit, and the defendant pleads in bar of the *scire facias* the facts above stated.

It is now claimed on the part of the plaintiff, that the County Court had no authority to entertain the motion for an *exoneratur*.

It has been regarded as settled law in this State, until the recent statute, that a mere privilege from arrest could not be pleaded in abatement of a suit brought in violation of such privilege. And the courts have often shown themselves somewhat astute, in devising grounds upon which to presume a waiver of the privilege from arrest, by giving bail, or in some other mode. But it is not now esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest.

He may notwithstanding bring an action of false imprisonment, or case, or may seek redress in such other modes, as the law affords. And it is very evident, that the English Courts of Common Law do interfere, at all stages in the proceedings, to relieve the bail. 3 Petersdorff's Ab. 74, where it is said, "If the exemption be satisfactorily established, the proceedings upon the bond will be set aside." The case of *Haliday* v. *Colo. Pitt*, (2 Strange, 985); S. C. Comyn, R. 444, satisfactorily establishes the rule, that under the English statute of exemption from arrest, if the case is clear of all doubt, the court will discharge on motion, founded on affidavits. And if doubts exist in regard to the fact, or right of exemption, the party is turned over to his remedy, by writ of privilege. The case of *Chester* v. *Upsdale*, (1 Wilson, R. 278.) recognises the same rule, but that case was held too doubtful to justify a discharge on motion. So too the case of *Bartlett* v. *Hobbs*, (5 T. R. 689.) And the same is again held in *Spencer* v. *Stuart*, (2 East, R. 89.) And in *Luntley* v. *Battine*, (2 B. & A. 234,) precisely the same general rule is declared by Abbott, C. J., and the former cases reviewed and approved.

We can therefore entertain no doubt, that the matter is regarded as coming fairly within the general discretion of the court, when the suit is pending, either against the principal, or the bail, to enter an *exoneratur* on the bail

bond, or discharge the bail on his own motion. And when the thing is done, it is conclusive upon the parties, and all interested.

Judgment that the plea is sufficient, and that defendant recover his costs.

Recent English Case.

Court of Exchequer, November 16, 1852.

LAVERONI *v.* DRURY ET AL.

Carrier by Sea — Damage by Rats.

Where goods put on board a ship to be carried by sea, for hire, under a bill of lading which contains only the usual exception, viz., "The Act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, rivers and navigation, &c. excepted," are damaged by rats during the voyage, it is no defence to an action by the owner of the goods, that the master had kept cats on board.

Semble, it would be a defence that rats had made a hole in the ship through which water came in and injured the goods.

CROWDER, on the 8th November, moved for a new trial, on the ground of misdirection by Martin, B., before whom this case was tried. The nature and facts of it appear in the judgment. *Cur. adv. vult.*

The judgment of the court, consisting of Pollock, C. B., Alderson, Platt, and Martin, BB., was now delivered by

POLLOCK, C. B. — We took time to consider this case, not because we entertained much doubt on the subject of it, but in consequence of Mr. Crowder's having cited several foreign authorities adverse to the opinion we have formed, viz., that there ought to be no rule.

This was an application for a new trial, made by Mr. Crowder on behalf of the defendants, on the ground of misdirection.

The cause was tried before my Brother Martin at the first sittings in this term, when a verdict was found for the plaintiff.

The declaration was in the ordinary form by the plaintiff, the owner of goods, against the defendants, who were ship-owners, for damage alleged to have occurred by the negligence of the defendants, owners of the ship Anna Sophia, to some Parmesan cheese, the property of the plaintiff, on a voyage from Genoa to London.

In the month of December, 1851, the Anna Sophia was

at Genoa, taking in cargo as a general ship, and the cheese in question was loaded on board, and three bills of lading signed by the master in respect of them. The bills of lading were in the Italian language, and all substantially in the same form; and by their terms, the master purported to bind himself absolutely to deliver the cheese safe and free from damage in London. He, however, was examined at the trial, and stated that he was ignorant of Italian, and that before he signed the bills they were read to him by the broker, as if the ordinary exception contained in the English bills of lading was contained in and was part of them, and that he signed them under the belief and on the understanding that they were in the ordinary English form. For the purpose of the present question it is to be considered that they were in such form: for the direction which is complained of was founded upon the supposition that the exception above referred to was contained in the bill of lading, and that the plaintiff was bound by it. The ship sailed, and arrived in London; but several of the cheeses, as it was found by the jury, were eaten and damaged by rats in the course of the voyage. It was proved by the master that he had two cats on board; and it was insisted by the learned counsel for the defendants that it was a question for the jury whether the defendants had not, by keeping the cats, excused or relieved themselves from the charge of negligence alleged against them. The learned judge, however, was of opinion that this was not a question for the jury: and he directed them that damage by rats was not within the exception contained in the English bill of lading, and that if they believed that the cheese had been eaten and damaged by rats, in the course of the voyage, the defendants were responsible to the plaintiff.

We are of opinion that this direction was right.

By the law of England, the master and owner of a general ship are common carriers for hire, and responsible as such. This, according to the well known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God or the Queen's enemies. They, however, almost universally receive goods under bills of lading signed by the master; and in such case the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties; the owner of the goods on

the one hand, and the master and owner of the ship on the other.

The exception contained in the English bill of lading, which is to be assumed to be in the bills of lading in the present case, will be found in Abb. Ship. 322, 8th ed., and is as follows: — "The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." We agree with the learned judge that the true question is, whether damage by rats falls within this exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall is, as "a danger or accident of the sea and navigation:" but this we think includes only a danger or accident of the sea or navigation properly so called, viz., one caused by the violence of the wind and waves (a *vis major*) acting upon a seaworthy and substantial ship; and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea.

In moving for the rule, the learned counsel for the defendants cited various foreign writers of great eminence and authority — Emérigon, vol. 1, pp. 375, 376; Consulato del Mare, chaps. 65, 66; Roccus, de Navibus, Not. 58; and Story on Bailments, sec. 513. The foreign authorities first above mentioned lay down the rule distinctly, that a ship's master who keeps cats is excused from damage by rats: but however eminent their authority, and however worthy of attention and consideration their works are, we cannot act upon them in contradiction to the plain and clear meaning of the words of the bill of lading, which is the contract between the parties. As to Mr. Justice Story, he very carefully confines himself to stating that such are the foreign authorities, and, as it seems to us, avoids expressing his own opinion upon the point. He cites a case in the Court of Pennsylvania, where damage by rats was held to be a peril of the sea; *Garrigues* v. *Cox*, (1 Binn, 592); but he also refers to another case, *Aymer* v. *Astor*, (6 Cowen, 266,) and to 3 Kent's Com. 301, where the contrary is stated to be the law.

It was strongly insisted that the same doctrine was laid

down by Lord Tenterden in his book on Shipping, p. 371; and there is no doubt that any opinion coming from him is entitled to the greatest weight and consideration. We do not, however, think Lord Tenterden can be understood as laying down such a rule. He cites the passage from Roccus, which states that keeping cats on board excuses the shipowner from damage by mice, but immediately after states this to be merely an illustration of the general principle, by which masters and owners are held responsible for every injury that might have been prevented by human foresight or care. Now, whatever might have been the case when Roccus wrote, we cannot but think that rats might be now banished from a ship by no very extraordinary degree of diligence on the part of the master. And we further are very strongly inclined to believe that in the present mode of stowing cargoes cats would offer a very slight protection, if any, against rats. It is difficult to understand how in a full ship a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it. But that Lord Tenterden cannot be understood as contended for by the learned counsel for the defendants in the present case, is evident from the authority which he cites for his view of the law. *Dale* v. *Hall*, (1 Wils. 281.) That was an action against a shipmaster who carried goods for hire. It was contended for the defendant at the trial that the plaintiff had proved no negligence, and it was proposed to prove that the defendant had taken all possible care of the goods, and that the damage accrued by rats having made a leak in the vessel whereby water was admitted, and that thereupon every thing possible was done to pump out the water and prevent the damage which happened. The evidence was admitted, and the defendant obtained a verdict. A new trial was moved for on the ground that the evidence was not legally admissible, and the rule was made absolute. The Chief Justice stated that the evidence ought not to have been received, that every thing was negligence in a carrier or hoyman that the law does not excuse, that he was answerable for goods the instant he received them, and in all events, except they happened to be damaged by the act of God or of the King's enemies.

This is the case stated by Lord Tenterden in the part of his book above referred to as one, indeed the principal, authority upon the subject; and we entirely concur in it, and it seems to us conclusive in the present case. In our

opinion, the application of the principle laid down in this case affords the only true rule for ascertaining with accuracy and certainty the liability of the master and owner of a general ship, viz., that *primâ facie* he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not, is to be ascertained by the terms of this document when it exists. There will therefore be no rule.

After this judgment had been pronounced,

POLLOCK, C. B., said — If indeed the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea damage. And

ALDERSON, B., added — Our judgment does not touch that question. A rat making a hole in a ship may be the same thing as if a sailor made one.

Rule refused.

Notes on Leading Cases.

CIVIL LIABILITY OF INFANTS FOR TORTS.

Grove v. *Nevill*, 1 Keble, 778. This action was for deceit in sale of goods, which the defendant represented as his own. Non-age was pleaded, and held a good bar, "this being no actual tort, or any thing *ex delicto*, but only *ex contractu*, which is voidable by plea, but it is a tort by construction of law." Windham doubted.

This is the leading case on the liability of infants to be sued for torts. It is referred to in *Johnson* v. *Pie*, 1 Keble, 913, where it is said that the defendant made a false representation as to the ownership of the goods. In the case of *Johnson* v. *Pie*, it was held that an action on the case for deceit would not lie against an infant for falsely representing himself to be of age, and thereby procuring a loan of money. The case is also reported, 1 Siderfin, 258, and is reported, but without a final decision, 1 Levinz, 169.

The liability of infants in actions of tort may best be considered under four different heads. 1. Actual, positive torts, disconnected with any contract. 2. Cases, where property coming by contract into the possession of an infant, is converted to his use. 3. Cases, where the conversion of such goods is not actual but constructive. 4. Cases, where an infant obtains possession of goods by fraudulent representations.

It is clear that infancy is no defence for actual, positive acts of wrong. An infant is liable for trespass, *Johnson* v. *Pie*, *ubi sup.*, for slander, *Hodsman* v. *Grissell*, Noy, 129; *Weaver* v. *Ward* Hob. 134; for permissive waste, 3 Salk. 196. Infants as well as married women are chargeable in trespass for procuring another to commit assault and battery. *Sikes* v. *Johnson*, 15 Mass. 389. A bastardy process lies against an infant, and he is liable on a bastardy bond. *McCall* v. *Parker*, 13 Met. 372. An infant was held liable for an injury resulting from his gross negligence in using a bow and arrow. But it is said that "where infants are actors, that might probably be consid-

ered an unavoidable accident, which would not be so considered where the actors were adults." 3 Wend. 391.

It is no excuse for the trespass of an infant, that he acted by the command of his father. *Humphrey* v. *Douglass*, 10 Verm. 71. Whether an infant is liable for bringing a malicious suit, is doubtful; but where he continued to carry out the case after he came of age, he was held liable. *Sterling* v. *Adams*, 3 Day, 411.

2 It was early held in *Manby* v. *Scott*, 1 Siderfin, 129, that if one deliver goods to an infant, the infant shall not be charged for them in trover and conversion. The reason given for this is the same given for the decision of *Johnson* v. *Pie*, 1 Sid. 258, that by a different doctrine, "all the infants in England would be ruined."

The later decisions establish a different doctrine. In *Bristow* v. *Eastman*, 1 Esp. 173, Lord Kenyon held that an action for money had and received would lie against an infant to recover money, embezzled by him, while in the plaintiff's employ. The judge said that the action was in substance *ex delicto*, though in form *ex contractu*. The propriety of this decision is questioned, so far as the form of action is concerned, in an able article in vol. 20, Am Jurist, pp. 248 - 262, written by Judge Metcalf. And there seems to be no good reason for allowing assumpsit to be brought in a case, where an action founded in tort was the natural and appropriate remedy.

In *Beal* v. *Hiscox*, cited in the last named case, a different decision was made. *Mills* v. *Graham*, 1 New Rep. 140, was an action of detinue. The plaintiff had bailed goods to a minor, who set up his minority as an answer to the contract of bailment, and it was held that detinue or trover would lie; but the question was not raised, whether infancy was a defence to the action.

In Massachusetts, it was held in *Badger* v. *Phinney*, 15 Mass. 359, that replevin will lie against an infant or his administrator, when the infant bought goods, and set up his infancy as a defence to an action for the price thereof. This decision was approved in *Hubbard* v. *Cummings*, 1 Greenl. 11, 13. In *Lewis* v. *Littlefield*, 15 Maine, 233, it was held that money, deposited in the hands of an infant as a stake-holder in an illegal wager, might be recovered in an action of trover, where the defendant had paid the amount to the winner, after notice from the plaintiff not to do so. Emery, J., dissented in a brief but able opinion, reported 17 Me 40.

In *Peigne* v *Sutcliffe*, 4 Nott & McCord, 387, an infant who was the agent of the plaintiff, and mate of his ship, was held liable in trover, for converting to his own use the goods of his principal. Upon the whole, there can be no doubt that infancy is no defence to an action for actual conversion of goods.

The cases on the third point are conflicting. It was early held, in *Crosse* v. *Androes*, that no action will lie against an infant innkeeper for the value of goods, stolen from his guests. 1 Rolle, Action on the Case D. 3. *Jennings* v. *Randall*, 8 Term Rep. 335, has been a leading authority on this subject. It was an action on the case for injury done to the plaintiff's mare, which the defendant had injured by riding farther and faster than he had agreed to do. And it was held that the action could not be sustained, being really founded in contract. In this case, Grose, J., says, "In trover an infant is always liable." p. 337.

In this country, *Homer* v. *Thwing*, 3 Pick. 493, is a leading case, in which it was held, that trover lies against an infant, who hires a horse and goes farther than the place agreed on, to the injury of the horse. Morton, J., delivering the opinion of the court, says, it has been contended, "That infants are liable for positive wrongs, and not for constructive torts. But we know of no such distinction, and in the case of *Jennings* v *Randall*, it is expressly rejected. It is true, that an infant cannot become a trespasser by any prior or subsequent consent. But he may be guilty of tort as well by omission of duty as by commission of positive wrong. 1 Chit. Pl 65; Co. Lit. 180 b; Butler's Note, 56. He is also liable for frauds as well as torts."

It is added that "Whenever trover is the proper form of action, it will be against an infant"

In New York, a similar doctrine was laid down in *Campbell* v. *Stakes*, 2 Wend. 137. It was said in this case that tresspass will lie, if an infant hiring a horse does any wilful and positive act, which amounts to an election to disaffirm the contract; but infancy is a good plea to an action on the case, because the case affirms the contract, as was held in *Jennings* v. *Randall*.

In the United States Court, *Vasse* v. *Smith*, 6 Cranch, 226, is a strong case establishing the liability of infants. An infant defendant was held liable in trover for goods, which came rightfully into his hands under a contract of bailment, and which were not actually converted to his use, but were shipped by him contrary to the plaintiff's instructions, and were thereby lost. But Chief Justice Marshall says, "That infancy might be given in evidence in such a case; for it may have some influence on the question, whether the act be a conversion or not."

On the other hand, it was held in Pennsylvania, that infancy was a good plea in bar to an action on the case for damages, where the defendant had hired a horse to go to one place and went to another more distant, and killed the horse by severe usage. *Penrose* v. *Curren*, 3 Rawle, 351. This decision was followed in *Wilt.* v. *Welsh*, 6 Watts, 1, where Gibson, C. J. notices and overrules *Homer* v. *Thwing*, *Campbell* v. *Stakes*, *Peigne* v. *Sutcliffe*, and *Vasse* v. *Smith*.

Schenk v. *Strong*, 1 Southard, 87, (New Jersey,) was an action on the case for damage to a carriage by an infant, who went on a different journey from the one agreed on, and failed to use due care. It was held that the action would not lie.

Towne v. *Wiley*, 23 Vermont, 355, was a case almost precisely parallel with *Homer* v *Thwing*, and a similar decision was made. In this case, *Jennings* v. *Randall* was approved, on the ground that there the defendant was only guilty of an omission of duty, or the breach of an implied contract. The court say that where the defendant departs from the object of the bailment, it amounts to a conversion, but where he keeps within the terms of the bailment, infancy will protect him, although he neglects to take proper care, or overdrives a horse.

4. It was settled in *Grove* v. *Nevill*, that an infant is not liable for a false representation, which forms part of a contract, as for a false warranty of property, or of soundness; and this decision has been universally recognised as law, in England and in America, excepting in one case in North Carolina. In *Green* v. *Greenback*, 2 Marsh. 485, infancy was held to be a defence to an action on the case for fraudulent representations, that a horse, exchanged by the defendant, was sound.

In *People* v. *Kendall*, 25 Wend. 399, an infant was held liable to indictment for obtaining goods by falsely representing himself to be the owner of certain property; but Nelson, C. J. says, that he would not be liable to an action; "for it is well settled, that a matter arising *ex contractu*, though infected with fraud, cannot be charged with a tort, in order to charge an infant by a change of remedy" p. 401. There is a dictum to the same effect in *Curtin* v. *Patton*, 11 S. & R. 305; but the only point decided in this case was, that an infant is not rendered liable on his contract by his representations that he was of full age. This point was also held in *Conrad* v. *Birdsall*, 1 John. Cas. 127; in *Burley* v. *Russell*, 10 N. Hamp. 184, and in many other cases

In *West* v *Moore*, 14 Vermont, 447, it was held that infancy was a bar to an action on the case for fraudulent representations as to the age of a horse, made on a sale. This case is approved in *Morrill* v. *Aden*, 19 Vermont, 505. But it is doubted in *Towne* v. *Wiley*, 23 Vermont, 355. *Brown* v. *Dunham*, 1 Root, 272, is a short case to the same effect. The only case, in which an infant has been held liable for a false affirmation, which formed part of a contract, is the case of *Ward* v. *Vance*, 1 Nott & McCord, 197,

which was an action on the case for a fraudulent warranty of a horse. The ground, upon which infancy has been held to be a defence in such cases, is that the false affirmation was of the subject-matter of the contract, and that as an infant could not make a contract, he could not be guilty of fraud in making one. A different rule has sometimes been held, where an infant has procured possession of goods, by representing himself to be of full age. It is said in Comyn's Digest, Action on the Case for Deceit, A. 10, that such an action will lie, and reference is made to 1 Sid. 183. But *Chetwin* v. *Venner*, the case referred to, does not sustain the doctrine, the only decision reported being on a motion for special bail. The case was similar to *Johnson* v. *Pie*, cited above, a direct authority against the proposition of Comyn, and it was probably dropped after that decision.

In *Wallace* v. *Morse*, 5 Hill, 391, an infant was held liable to an action on the case for obtaining goods with intent not to pay for them, by fraudulently representing himself to be of age. But in *Brown* v. *McCune*, tried in the Superior Court of New York City, reported in the October number of this Journal, p. 336, an opinion against such an action was expressed by Sandford, J. In *Fitts* v. *Hall*, 9 N. Hamp. R. 441, an action was sustained against an infant, who procured goods on credit, by representing himself to be of age, and a learned and able opinion was given by Chief Justice Parker. The court approved *Grove* v. *Nevill*, but distinguished the case before them from that, on the ground that there the representation was part of the contract, and that if false, it furnished ground to maintain assumpsit; but here the representation was no part of the contract, and did not result from it. The tort was held to be a distinct and positive wrong. This case is criticised in American Leading Cases, vol. 1, p. 118, where most of the cases cited above, are referred to. It was approved in a recent decision in Vermont, *Towne* v. *Wiley*, cited above.

The reasoning of the court in *Fitts* v. *Hall* seemed to be sound. There was truly no contract in this case. The defendant was not bound, because of his infancy, and the plaintiff was free from any obligation, on account of the defendant's fraud. The question is, whether infancy shall protect a party, who obtains possession of another's goods by false and fraudulent representations. The general rule is, that where wrong and injury concur, a foundation is laid for an action. Here the wrong was an actual, positive one, and an infant is as much liable for fraud as for violence. It follows that he would be liable as soon as he received the goods, before he had set up his infancy as a defence to an action of assumpsit, and before any demand had been made upon him. In general, an action lies as soon as one party has obtained possession of another's goods by fraud. *Furnis* v. *Leicester*, Cro Jac. 474; Year Book, 9 H. 7, 21 b. There seems to be no good reason for holding an infant criminally liable for an act, for the consequences of of which he is not liable civilly. The question is somewhat less difficult, where the misrepresentation formed no part of the contract, as in *Fitts* v. *Hall*; but it is hard to distinguish such cases from those, where a fraudulent warranty was made.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts. — Worcester, October Term, 1852.

Action for Money had and received — Sale of an Interest in Real Estate. Plaintiff's intestate was widow of one Carter, and as such entitled to dower out of his estate, though the same had never been set off to her. Previous to 13th May, defendant was heir at law of the husband, and as guardian of

a minor heir obtained license to sell the minor's interest in the estate. It being thought best to sell it all together, the widow, and all the heirs except one, who was absent, made a bond to defendant that if he would proceed to sell the entire estate at the same time that he sold the share of the minor, they would execute deeds, &c. of their interests. He accordingly advertised the estate to be sold on the 13th May, and stated at the foot of the advertisement that the remaining heirs of the deceased would at the same time sell their respective rights, and the widow would relinquish her right of dower, so that a full and perfect title would be given.

On the 13th the estate was put up at auction, and a certain sum bid for the same. On the 17th, plaintiff's intestate committed suicide. On the 9th June, the purchaser received deeds from the heirs, and defendant as guardian, bearing date the 13th of May, and paid the full amount bid for the estate. The defendant received two shares of this amount, and this action was to recover the portion of the widow's share of the sum originally bid for her and the heirs' interest, though not paid till after her decease.

The court *held*, that plaintiff had no right of action, that his intestate never consummated any agreement by the delivery of any deed, or by parting with any estate; that no sale in fact took place till after her death, nor was there any binding contract for sale, and consequently she never acquired any right to claim any of the purchase-money. — *Fletcher, Administrator* v. *Carter.*

Husband and Wife — Payment by Husband of Wife's Debt. Plaintiff's wife, while *sole*, was indebted to one Flagg, who commenced an action against husband and wife after marriage to recover the same. The wife died, and the husband allowed himself to be defaulted, and paid the debt His wife having left property, defendant was appointed her administrator, and this action was to recover of her estate the amount so paid.

The court *held*, that the husband being liable for his wife's debt only during coverture, his allowing himself to be defaulted and paying the debt after her decease, made it a voluntary payment on his part, and he could no more recover than if he had volunteered to pay the debt of a third person. Judgment for defendant. — *Warren* v. *Williams, Administrator.*

Insolvent Debtors — Suit by Assignee — Set-off. This was an action brought for the benefit of one Holbrook, upon a note made payable to him. He became insolvent, and this note with other property was sold by his assignee, the present plaintiff, and purchased by Holbrook.

It was *held*, that under the stat. 1838, c. 163, the action was properly brought in the name of the assignee, and that it was competent for Holbrook to purchase and prosecute a suit to recover the note in the assignee's name. An unliquidated claim for damages for flowing defendant's land by plaintiff for mill purposes, is not a matter of set-off in an action of assumpsit for the recovery of moneys due. — *Pitts* v. *Holmes.*

Mortgage — Trespass — Mortgagor may not cut Timber — Trespass Quare Clausum. Plaintiff claimed title to the *locus in quo* as mortgagee; the defendant claimed as mortgagor. The alleged trespass was for cutting trees. Plaintiff had commenced a writ of entry against defendant to foreclose mortgage, and obtained conditional judgment at the time of the cutting, but no writ of possession had been issued.

Defendant contended that this suit was an abandonment of a previous possession which plaintiff had taken of the premises *in pais* for the purpose of foreclosing the mortgage. But query as to this, for a mortgagee may

bring his action against mortgagor to foreclose his mortgage, even though in possession himself.

But a mortgagee may always maintain trespass against a mortgagor, though in possession, for cutting timber. The principle does not extend to the cultivation of land by mortgagor, nor cutting wood or timber for fires or fences, &c. But any cutting of timber beyond these by a mortgagor, renders him liable in trespass *quare clausum* to the mortgagee. — *Page* v. *Robinson.*

Mortgage — Foreclosure. A second mortgagee cannot maintain a writ of entry to foreclose his mortgage against a tenant in possession claiming under the first mortgagee. — *Batcheller* v. *Pratt.*

New Practice Act — Construction. This was a petition under the provisions of the stat. 1851, commonly called the code of practice, § 66, filed by an assignee in insolvency of one Watson, on the ground that defendant held a mortgage upon certain real estate of the insolvent which the creditors regarded as fraudulent. The respondent lived in New Hampshire, and disclosed in his answer that he was administrator of the mortgagee, and objected to the prayer of the petition being granted.

One objection made was, that the stat. of 1851, c. 233, was repealed by that of 1852, c. 312, § 86; this not being an "action pending" at the time of the passing of the latter act, although the proceedings were commenced while the act of 1851 was in force. But the court *held*, that the term "action" in the statute extended to all legal proceedings pending at the time of the repeal, and consequently, within the saving clause.

As to the power of the court to compel a citizen of another State to sue an action in our State courts to test his title to lands within the State, the court expressed no opinion. But as the respondent, in the present case, had no authority to sue the mortgage without taking administration upon his intestate's estate in this commonwealth, the court did not consider they were authorized to compel him to come and take such letters, and consequently could not entertain the prayer of this petition, and it was dismissed. — *Beaman* v. *Elliot.*

Promissory Note — Indorser — Waiver of Notice, &c. If the indorser of a note is not notified of demand on maker at maturity and failure to pay, or if no demand was made on maker at maturity, and with a full knowledge of the want of demand or notice he agrees to pay the holder, such promise will be a waiver of objection on that account, and render him liable to the indorsee in an action for the recovery of the note, although no new consideration for such promise is proved. — *Low* v. *Howard.*

Scire Facias — Trustee's Answer, how far conclusive. In this case defendant had been summoned as trustee of a partnership, B. & C., and in his answer disclosed a purchase, or exchange of certain property with one of the partners as a partnership transaction, whereby a certain sum was in his hands which he had paid on the original execution. The plaintiff, contending that it was a private dealing with B. alone, brought *sci. fac.* against defendant, and offered evidence to prove this, whereby a much larger sum would be found in defendant's hands as trustee of the partnership.

The court, without deciding how far a party might go in an action of *sci. fac.* to prove facts inconsistent with the trustee's answer in the original suit, *held*, that inasmuch as the very question sought to be raised by this process had been determined by the defendant's original answer as trustee, it was not competent to controvert that by proof, the plaintiff's remedy, if any, being by an action for a false answer. — *Gouch* v. *Tolman.*

Trover — Burden of Proof. Trover for a watch left by plaintiff with defendant to repair. When plaintiff called for his watch, defendant informed him he could not deliver it, as it had been stolen. The court thereupon ruled that it was incumbent upon defendant to show he used reasonable care of the watch, if he sought to excuse himself for not delivering it when demanded. The court *held*, that although trover might not lie against defendant for losing property entrusted to him, the point not having been taken or argued, was not before the court, and that the ruling of the court below, as to burden of proof, was correct. — *Brown* v. *Waterman*.

Taxes — Money had and received. Assumpsit to recover the amount assessed and paid by plaintiff as taxes, on the ground of irregularity in the proceedings of assessors in the mode of assessing the same. The question discussed and settled by the court was, whether money had and received would lie against the city, even if the assessors had acted against law in the assessment of the tax.

This form of action as applicable to recovering back moneys paid under proceedings for assessment and collection of taxes, is a modern one. Formerly trespass was the form in use.

But the cases, where such an action lies, are those where the tax is wholly unauthorized, and the money has been collected and received by the town or city to its own use. But where there is a mere irregularity in the mode of assessment, the statute furnishes the only remedy, viz., by application for abatement, and this form of action will not lie.

In the present case, the plaintiff being liable to be taxed in some form and to some extent, it was unnecessary to consider whether the assessment was irregular, for even if such were the case the present action could not be maintained.

The Chief Justice, in giving the opinion of the court, cited and commented on *Murray* v. *Gloucester*, 2 Dane, Abr. 330; *Stetson* v. *Kempton*, 13 M. R. 272; Rev. Stat. c. 7, § 44; *Sumner* v. *Dorchester*, 4 Pick. 361; *Preston* v. *Boston*, 12 Ib. 7; *Boston and Sandwich Glass Co.* v. *Boston*, 4 Met. 181; *Torry* v. *Millbury*, 21 Pick. 64; *Osborn* v. *Danvers*, 6 Ib. 98; *Boston Water Power Co.* v. *Boston*, 9 Met. 199; *Howe* v. *Boston*, 14 Law Rep. 551; *Inhab. of Newburyport* v. *County Com'rs*, 12 Met. 211. Judgment for defendant. — *Lincoln* v. *City of Worcester*.

Voting Lists — Duty of Selectmen as to inserting Names of Voters. In this case, which was an action against the selectmen of H. for refusing to place plaintiff's name on the list of voters at the election of State officers and also at an election of a Representative in Congress, the selectmen, after the town-meeting was opened, notified those whose names had been omitted, that they might be heard as to placing their names upon the list. The plaintiff came forward to the selectmen and offered what he contended was satisfactory evidence of his qualification as a voter, and requested to have his name inserted in the list. This they declined to do, although others who applied before and after him were placed upon the list. The court *held*, that the selectmen were not bound to receive and examine such application after the opening of the meeting; that if they had a right to do so, their neglect or refusal to insert the name of the voter, after the meeting was opened, would not subject them to the liability of an action therefor.

This decision does not impugn the authority of selectmen to correct the lists of voters after the meeting for an election has been opened, in cases of manifest error: such as striking off the names of voters from the list who are not legal voters, and the like; and also, if they see fit, to add the

names of legal voters to such list which have been omitted. — *Waite* v. *Woodward et al.*

Witness — Competency of an Attorney's Clerk to Testify. In this case the question was as to excluding the testimony of a witness to whom the party made certain statements and declarations in the office of an attorney of this court, where he had called for the purpose of obtaining professional advice. The witness was a student of the attorney, and the latter not being in the office, it was contended that the party supposed the witness was the attorney.

But the court *held*, he was improperly excluded from testifying; that the declarations which are protected and not to be testified of are confined strictly to those made to members of the legal profession, for the purpose of ascertaining the legal rights of the party making them, and do not extend to communications made to a student of an attorney in his absence, though made in the office of such attorney. — *Barnes* v. *Harris.*

Supreme Judicial Court of Massachusetts, Suffolk, ss., November Term, 1852.

Action — Evidence. Case for maliciously causing the plaintiff to be arrested at the suit of J. T. without authority. At the trial the plaintiff, a physician, gave notice that he should claim no damages for any injury to his professional character, and offered evidence of actual malice on the part of the defendants, who offered to impeach his character as a physician and citizen. *Held*, that such an action might be maintained without proof of malice, but that evidence of malice was admissible to increase the damages; and *held*, further, that evidence was not admissible to impeach the plaintiff's professional character; that the notice given as stated would render it inadmissible, while the evidence offered was inadmissible on general grounds; and that although the allegation in his writ, that in the former action he had been falsely charged with malpractice, might have rendered evidence for the defendant as to that particular charge admissible, it would not evidence of a general character. — *T. H. Smith* v. *Hyndman et al.*

Evidence — (See *Action, Railroads*) — *Insolvent — Trover.* Trover by the assignee of an insolvent to recover goods mortgaged by him, against the mortgagee. (See Stat. 1841, c. 124, § 3.) *Held*, that evidence was admissible for the defendant that at the time of taking the mortgage he made inquiries of a party, who told him he had never heard the mortgagor's insolvency discussed, but considered him perfectly good, — it being part of the actual transaction of taking the mortgage; also, that until the proceedings in insolvency were closed, copies from the record, certified by the clerk, were admissible without further authentication. It being agreed that all the original papers in the case should be evidence subject to objections to their competency, the plaintiff read to the jury a certain petition filed in the insolvency proceedings; and it was *held*, that this was no ground of exception, although it was not evidence of the facts alleged therein. — *Charles Boardman, Assignee*, v. *Charles B. Kibbee.*

Husband and Wife — Promissory Note. An action cannot be sustained by a woman against the personal representative of her deceased husband, on promissory notes given to her by the deceased during coverture, for money which she was possessed of and owned at the time of their marriage. — *Eliza O. Jackson* v. *Thomas B. Parks, Executor.*

Jurisdiction — Mortgage. Under Stat. 1840, c. 87, § 1 and 3, a writ

of entry to foreclose a mortgage may be brought in the Supreme Court, or be removed to that court, if originally brought in the Common Pleas, on affidavit that the property claimed exceeds six hundred dollars in value. — *Leonard Hyde* v. *David S. Greenough.*

Landlord and Tenant — Estate at Will. A note to quit under the Rev. Stat. c 60, § 26, where the rent is payable at intervals of less than a quarter, must be to quit at the expiration of a month, week, &c. (*i. e.* of such interval) from the day when the rent is payable. — *William Prescott, Jr.* v. *William Elms.*

Promissory Notes — (See *Husband and Wife*) — *Notice to Indorser.* Action on a promissory note against the indorser. Defence, want of notice. The note fell due October 29; the indorser died September 5, having named the defendant executrix. She presented the will for probate October 4. Notice thereof was published in the Daily Advertiser, taken by the plaintiffs, October 5th, 12th, and 19th. October 23 she was appointed as executor by the Judge of Probate and qualified as such, and gave notice of her appointment in the same newspaper, Oct. 26, Nov. 2 and 9. After the indorser's death and before October 23, the president of the bank was told that the defendant was named executrix, but had no knowledge of her appointment by the judge of probate before October 29. October 29 the note was presented to a notary for demand and notice. The notary inquired who was to be notified, and who was the representative of the deceased. The messenger replied that he did not know, but the notary made no further inquiry, and the notice was addressed "To the Estate of H. J. O., Esq., deceased, R., Mass.," and put into the post-office. *Held*, that when the indorser of a note dies before maturity, it is necessary, in order to charge his estate, that notice of non-payment should be given to the executor or administrator, if there be any known to the holder, or who might be known to him on his using due diligence to ascertain; that when the holder and the executor or administrator live in different towns, a notice properly directed to the latter and put into the post-office is sufficient; that the notice in the present case was not properly directed, and that due diligence was not used by the plaintiff to ascertain the proper direction. — *Mass. Bank* v. *S. H. Oliver, Executrix.*

Railroads — Corporation — Lease — Evidence. Action against the Old Colony Railroad Corporation for an injury in consequence of negligent management on the South Shore Railroad. There was an executory agreement between the two corporations that the latter road should be leased for almost all purposes to the Old Colony Corporation, which was to carry it on. Subsequently the parties agreed that this agreement should take effect from and after a day certain. *Held*, that this was a lease from and after that day, and was a valid contract, being sanctioned by Stat. 1849, § 63, (passed before the cause of action accrued,) whether valid independent of that contract or not; and that the South Shore road was the road of the defendants within Rev. Stat. c. 39, which regulated this case, so that the Old Colony Railroad Corporation were subject to all the liabilities thereby imposed on this road as on their own. Testimony was taken by deposition by the plaintiff as to what an agent of the defendants said, and they afterwards filed interrogatories to another witness as to the same point. This testimony being rejected when offered by the plaintiff, the defendants thereafter offered their deposition, and proposed to put it in, omitting that portion of it relating to this point; but it was *held*, that the whole must be read, and that when a party wishes to take a deposition on interrogatories for the purpose of meeting the testimony of a witness who has deposed for his adversary, but does not desire to use the answers to certain of those interrogatories unless the testimony of the other witness shall be used, he must give notice in some way that the purport of these is merely to meet

the testimony of his adversary's witness. Then if the other testimony is not offered or admitted, he will not be required to read the answers to those interrogatories, otherwise he must read the whole if required. — *Arad T. Linfield* v. *Old Colony Railroad Corp.*

Way — Contract. Assumpsit on an agreement to pay five hundred dollars towards widening a street in Boston, on condition that the city "should cause the said D street between M and W. streets to be widened by cutting off all the estates on the easterly side thereof, and leaving that portion of said street twenty-four feet in width of its narrowest part, and provided the same shall be completed within the present year." By proceedings in the ordinary course, in all respects regular, the board of aldermen laid out as a public way a parcel of land on the easterly side of D. street, between M. and W. streets, sufficient to make it of the requisite width, (a portion of which the owners conveyed to the city to be used as a street,) and ordered the removal of all buildings and obstructions over the line of said street as laid out. The buildings &c. were cut off by the city, leaving the street on the portion conveyed as above in fact a few inches less than twenty-four feet at the narrowest part, and leaving also a portion of the buildings projecting over the line of the street in the air, but there was no evidence that the projection beyond the line of widening was left or suffered to remain by any vote of the city or by the consent or knowledge of any officer thereof, unless the same could be inferred from the above facts. The defendant contended that the conditions of the agreement were not complied with. But it was *held*, that it was not necessary that the street should be clear *usque ad cœlum*, nor essential in order to widen it, that all obstructions should be removed; and that the street, having been laid out by proper proceedings on the part of the board, it became and was a street twenty-four feet wide, and all the consequences followed, so that the condition of the agreement was complied with. — *City of Boston* v. *John Simmons.*

Will — Power — Presumption — Trust. H. H. by his last will directed real estate to be sold, and the proceeds to be paid over to and divided between his two daughters by his executor, and died in 1773, leaving one son, B. H., and two daughters. The executor was outlawed, fled the country, and never executed the power. B. H. being *non compos*, was placed under guardianship in 1799, and so died in 1830; and on proceedings to recover part of said real estate by the heirs of B. H. against parties claiming under conveyances from the daughters, it was *held*, that the will gave a power coupled with a trust which was imperative on the donee; that until the execution the fee in the land vested in the heirs subject to the trust which they might be compelled to enforce, and that under the circumstances a conveyance by B. H. in conformity with the trust would be presumed — *Ira Greenough et al., Pet'rs for Partition*, v. *Persons unknown and Charles Wells; Charles Hall et al., Pet'rs, &c.* v. *Benj. Remick et al.; Charles Hall* v. *Luther Barnes*: *Frederick Ockerhausen* v. *Luther Barnes.*

Writ, Indorsement of — Motion to Dismiss — Practice — Replevin. Motion to dismiss for the want of a sufficient indorser, the plaintiffs residing out of the State, and for defects in the appraisement.

The writs were indorsed "from the office of W. D." *Held*, that this was a sufficient indorsement; and the defendant having filed answers to the merits November 13, and the motions to dismiss November 17, it was further *held*, that under the New Practice Act of 1851, § 32, providing that when the defendant has appeared and answered to the merits of the action, no defect in the writ or other process, &c. shall be deemed to affect the jurisdiction, (see also Act of 1852, § 22,) the motions came too late, and that it made no difference whether the court was then in session

or not. — *Josiah Seagrave* v. *Aaron Erickson et al.*; *B. W. Evans et al.* v. *Same.*

Supreme Judicial Court, Essex, ss., November Term, 1852.

Present Shaw, C. J., Dewey, Metcalf, Bigelow, and Cushing, JJ.

Action — Pleading — Defect cured by Verdict. Action on the case for injury from the bite of a horse belonging to defendant. *Held*, that after verdict it was no ground for an arrest of judgment that the plaintiff's declaration did not allege that the injury occurred through no fault of the plaintiff, this defect having been cured by the verdict. — *Poplewell* v. *Pierce.*

Boundaries, upon Highways. The presumption of law is that highways were built over the lands of private proprietors; and where a boundary line is described as running to a highway, thence along said highway, the presumption is, unless controlled by other circumstances, that it was along the middle of the highway. — *Newhall* v. *Greson.*

Common Carriers — Liability for Baggage of Passengers, how limited. Action against Boston and Maine Railroad Company, as common carriers, for the loss of a box containing shoes, shoe-pegs, &c. taken in a passenger train. *Held*, that the liability of railroads as common carriers, under such circumstances, is strictly limited to personal baggage, in which term the articles in question can by no means be included. — *Collins* v. *Boston & Maine Railroad Co.*

Conditional Sale — Mortgage — Trover. Action of trover under the following facts and agreement. "Boston, Mar. 15, 1850. Albert Benson, of Plymouth, bought of J. B. Whittier 4 carriages, as follows: one carryall, $225, &c. — and said Benson is not to hold the above carriages until he has paid for the same. Terms of payment as follows: $200 cash down, &c.; each and all of them with interest; which payments are to be indorsed on this instrument as they are made to said Whittier. And provided said Benson does not meet the said payments as they become due, then the said Whittier can take the said carriages for such payments, each or any of them, and said Benson forfeits what he has previously paid, as witness my hand and date above-mentioned. Albert Benson." Among several indorsements on the back of the instrument, the first was the following. "Rec'd of the within agreement, $200. Plymouth, March 15, 1850."

Held, that this was not a mortgage, but a conditional sale, and that Whittier might maintain trover against a mortgagee of Benson. — *Whittier* v. *Barnes.*

Contract — Right of Parties after Dissolution. H. having in pursuance of a contract with B. placed building materials on B.'s land: *held*, that after the contract was dissolved by mutual agreement, or by the fault of B., A. was not liable in an action of trespass for a mere entry for the purpose of taking away said building materials. — *Azzington* v. *Larrabee.*

Corporation — Execution against, how may be Levied — Payment of Money under Mistake. An execution against a corporation may be levied on any individual member, and a payment made on such execution is voluntary. — *Abbot* v. *Sprague.*

A person paying money under a mistake with regard to certain facts, cannot recover back the same if he was under a liability to pay it. — *Ibid.*

Corporation — Practice. Where the individual members of a corporation are permitted to come in and plead in an action against the corporation, where the corporation is defaulted, they cannot set up the defence that the

plaintiff had no cause of action against the corporation. — *Farrar* v. *Ballard Vale Machine Shop.*

Fraudulent Conveyances — Who may interfere to set aside. The right to set aside a conveyance, fraudulent as to creditors, can be exercised by creditors only. — *Murphy* v. *Morland.*

Innkeeper, Liability of, under Statute. An innkeeper, not being provided with a license, as granted by statute, cannot on that account escape the liability incident to his calling — *Marks* v. *Parker.*

Insurance Company, Mutual Fire — Representations. A., being the purchaser of a factory subject to two mortgages, and several attachments on the equity of redemption, the attachments were levied and the equity sold. In an application to a mutual insurance company, within the year after the sale, in answer to the question, — "Is the property incumbered?" he replied, "Yes, to the amount of $22,000, upon property worth $30,000; *held*, that the representation was correct and sufficient; also, that he had an insurable interest on the estate, and that the insurance company had a lien upon his to redeem, which was an interest in lands subject to certain limitations in the same way that a mortgagor has an interest in land subject to the mortgage. — *Buffum* v. *Mutual Fire Insurance Company.*

The court distinguished this case from one about to appear in 6 Cushing; there the applicant only held a bond for conveyance; merely a contract for the delivery of lands. — *Ib.*

Married Woman — Divorce. A married woman who has been divorced from bed and board, and to whom the custody of her minor children has been decreed, cannot recover on a *quantum meruit*, on a contract made by the defendant to maintain and educate her minor daughter, such contract being made before the divorce and the daughter having remained with the defendant both before and after the decree. — *Farnsworth* v. *Wakefield.*

Sale of Horse — Breach of Warranty. In an action for breach of warranty in the sale of a horse, the jury may infer a breach, if at the time of the sale the seeds of the alleged disease must have been present in the system, although the existence of the disease could not then be detected. A mere constitutional predisposition to disease does not of itself constitute a breach of warranty. — *Woodbury* v. *Robbins.*

Taxes — Realty or Personalty — Trespass. A house standing upon the land of another was charged to the owner in his tax-bill as real estate, and in all the stages of collection was treated as real estate, but was sold for the non-payment of taxes as personal estate. *Held*, that whether real or personal, it should have been treated throughout as one or the other, and that a purchaser under the sale, entering said house, was guilty of trespass. — *Flanders* v. *Cross.*

Water-courses — Rights of Riparian Proprietors. A., through whose premises a brook ran, built a culvert, whereby the water was diverted from flowing in its usual course through the premises of B. *Held*, that B. might maintain an action, although suffering no damage except the general diminution of the value of his estate. — *Newhall* v. *Greson.*

Streams of water are for the general benefit — *publici juris* — incident to the land; and every person through whose land they flow can make a reasonable use of the water; *i. e.* such a use as is consistent with a reasonable use by other riparian proprietors. — *Ib.*

Where a person is empowered by special act of the legislature to build a culvert to the damage of other individuals, it must be presumed, that it was granted on the understanding that he had a right to occasion such damage — *Ib.*

Will — Construction. A testator left his widow the interest on $6,000.

The executor set apart that sum, and for three months it produced only $70. This sum was tendered by the executor to the widow, but was refused. *Held*, that she was entitled to the legal interest on $6,000, viz. $360 per annum, and not merely to the income of the funds set apart by the executor. — *Brimblecom* v. *Hazen*.

This case depends much upon the peculiar phraseology of the will.

Miscellaneous Intelligence.

PROCEEDINGS OF THE BAR UPON THE OCCASION OF THE DEATH OF DANIEL WEBSTER. — Continued from page 479.

Chief Justice Shaw responded on the part of the Court, as follows:

Gentlemen of the Old Colony Bar — This court, in behalf of whom I now speak, do most cordially assure you of their full participation in the feelings of profound sadness and grief, which every where pervade this great community, in view of the signal bereavement which we all deplore, and their sincere sympathy in the sentiments expressed in the resolutions which you have now offered. We are called upon to lament the loss of an illustrious man, of an eminent statesman, of a profound jurist, and eloquent advocate. It seems fitting therefore, amidst the exciting interests, the exacting cares, and the laborious duties, to which we are devoted, to pause, and listen with reverent awe to the deep lessons of wisdom, which Providence is teaching us, by an event so impressive. We are thus forcibly reminded, that however illustrious any man may become for learning and wisdom, that however important and necessary his life and services may seem to his friends, his country and his race, to whatever height of fame and prosperity he may have reached, still, the time of his departure comes, as it comes to all, when all the attractions of earth lose their lustre and their force, and we are awakened to a deep conviction of the solemn realities of another life, in comparison with which all the interests of this our mortal being, seem trifling and insignificant.

We are now forcibly reminded, by all that we see and feel, that a great man has fallen among us. Mr. Webster has long been, in the full view of our whole community, regarded as a man of great wisdom, a prudent guide and counsellor, who had the best good of his country and of his race always at heart. Conspicuous alike for his commanding talents, his large and comprehensive views, the purity and correctness of all his great purposes, he was looked to as one who could be safely trusted, in the darkest hours of his country's prospects, to protect her from suffering and peril, from within and from without. Mr. Webster's whole course of public life, in which he has been steadily advancing in honor and usefulness, has been known and visible to the whole community; and the strong and universal manifestation of grief and sadness, which have every where followed the news of his decease, afford ample proof of the firm hold which he had upon the confidence and affections of the people.

As a statesman, he was equally distinguished by the resources of his capacious mind, and the eminent wisdom of his counsels. In the exertion of his great powers, in public affairs, no partial or sectional interests, no private or party views, could allure him from the path of the general and public good. Dazzled by no visionary theories, deluded by no speculative projects, his views were decidedly practical and attainable; looking to the actual and various conditions, to all the liberal and industrial pursuits of the whole people of the Union, he was equally comprehensive in his

regards, and just and discriminating in his measures. He was ardently devoted to the support of the Constitution in its integrity, because he regarded it, under Providence, as the only safeguard and guaranty of the Union; and he loved the Union, because, in his sober judgment, its preservation is essentially necessary to the peace, liberty and security, and consequently to the best and truest interests of the whole community. Peace, internal harmony, security for all personal, social and political rights, these, if we may judge from his clear and often-repeated declarations, were, in his view, the leading object of all government; and that practically, that government is best, which gives the highest encouragement to personal exertion, and the largest scope to individual enterprise, in every honest and laudable pursuit, which can be given, consistently with a just regard and an effectual security, to the equal rights of all.

But this is not the time or place to attempt a discriminating or detailed view of Mr. Webster's high qualities as a statesman. He will long be remembered throughout the Union, on the ocean and in the workshop, on the farm, and in every walk of industry, as the Defender of the Constitution, the faithful friend of the Union, and the advocate of the just rights of all the members of this great and growing community.

In addressing myself to a body devoted to the study and practice of the law, and the administration of justice, many of whom have been associated with him as a professional brother and friend, and all of whom have been accustomed to regard him as an honor to the profession which they love, it seems more fitting to allude briefly to the character of Mr. Webster as a jurist and an advocate. He early selected the study of the law, which, when faithfully and honorably pursued, may justly be regarded as a high and honorable profession, inasmuch as it looks to the practical assertion of right, liberty, and justice, as its leading object. He soon distinguished himself for great research, for large and comprehensive views of the law, and of those broad principles of right and justice, having their deep and immovable foundations in the moral laws of our nature, which constitute the true basis of all law. As soon as he entered on the career of practice, he became distinguished at once, as a learned jurist and an eloquent advocate. With a natural acumen and power of legal discrimination quite unsurpassed, with a force of logic and power of eloquence, which gave to every argument its most efficient impress, he soon attained to a rank in his profession, which elevated him to an equality with those, who had been previously regarded as the lights of the professional firmament, in this and the neighboring States, and who were then held in the highest estimation for professional eminence.

In one department, that of constitutional law, he was peculiarly distinguished, and gained a reputation, second perhaps to no one, unless that of him, who was so long distinguished, as the head of the first judicial tribunal of the country.

Starting like other students, with no extraordinary external aid, and reaching the highest eminence, the example of Mr. Webster may well be held up, as an encouragement to young men, struggling in the earlier stages of a profession requiring persevering effort and untiring industry. Let those who have watched the dawn of his early professional reputation, the splendor of his meridian success, and have now witnessed its brilliant close, take courage, and hope on, holding his virtues and his industry as a high example, and his renown as a never-failing encouragement to patience and perseverance in well-doing.

In these remarks, brief and hasty as they are, I would not wholly overlook the example and influence of Mr. Webster, as a man, a friend, a member of society, and a public benefactor. Always foremost in the promotion of all social institutions, for education, for the improvement of

mind, for the cultivation of the social affections, for the improvement of taste, he did much, to give value and dignity, as well as grace and elegance, to refined society. Devoted to the cultivation of letters, seeking in the annals of the past, the examples of the wise and good for the encouragement and improvement of the present times, venerating especially the virtues and achievements of our hardy ancestors, he was ever ready, with his treasures of learning and his powers of eloquence, to unite with others, in commemoration of great events, and interesting epochs. Wherever particular times and places have been consecrated to the love of liberty and of country, to the commemoration of illustrious public benefactors, there was he prepared to utter the eloquent words of wisdom to listening crowds, where their import would be most impressive. At Plymouth Rock, at Bunker Hill, at the Monument of Washington, wherever the wise and good assembled to commune and learn wisdom from the past, his presence and his glowing eloquence were not wanting.

But he is gone; a great light and glory of our age has departed from our sight, not indeed until he had done all, that a great statesman, an illustrious advocate, a humble and devout Christian, a most distinguished citizen and man could do, to improve and benefit his age and his race, and especially, as his crowning excellence, to turn their hearts and thoughts from the alluring engagements and engrossing cares of this transitory life, to a higher and more enduring state of existence beyond the grave. In this view it is fit that we now regard him, as one, who has done much to benefit one world, without omitting the higher function of pointing the way to another. Let us be grateful to a benign Providence, for all the good, which the statesman and benefactor was able to do; and let us profit by the good examples he has given us, and the grave lessons which his life, character and death, have taught us. Whilst devoting ourselves faithfully, and with all our powers, to the discharge of our duties, those duties, which we fondly flatter ourselves are high and important, and which do indeed touch the dearest earthly interests of men, and of communities, let us never forget, that amidst these, as part of these, and necessary to their just performance, that there is one duty, never to be overlooked, that of a steady and constant regard, and of a frequent and solemn reflection on the higher subjects of life, death and immortality; that whether we live or die, we may be found in the way of duty.

Proceedings in the Supreme Court at Worcester. — A Nisi Prius term of the Supreme Court of Massachusetts was in session at Worcester, Mr. Justice Fletcher presiding. A meeting of the Worcester County Bar was held at the Law Library, in the court-house, on Monday, October 25. Hon. Emory Washburn was called to the chair, and W. H. Howe, Esq. was appointed secretary. Hon. B. F. Thomas of Worcester, Hon. Nathl. Wood of Fitchburg, and Hon. Henry Chapin of Worcester, were nominated a committee to prepare suitable Resolutions to be presented to the Court. The Court, at its coming in, in the morning, upon the motion of Judge Washburn, who had been requested by the Bar to perform that duty, adjourned for the day.

Friday, October 29. At the opening of the court, Hon. B. F. Thomas, in behalf of the committee, briefly addressed the court, and presented the following Resolutions, which Mr. Justice Fletcher, without making any address, ordered to be placed on the records of the court.

Resolved, That the members of the Bar of the county of Worcester have heard with deep sorrow the intelligence of the death of Daniel Webster.

Resolved, That while with our fellow-citizens we mourn the departure of the transcendent orator and statesman, we desire especially to record

our sense of the loss of the constitutional jurist, whose arguments were models of reason and eloquence, whose opinions had the weight and force of judicial judgments, and who, though he never sat upon a Bench, by his services in the exposition and defence of the Constitution of his country, rivalled the fame of her greatest magistrate, John Marshall.

Resolved, That by his comprehensive views of the character of his profession, by his elaborate preparation for the discharge of its duties, by the richness and breadth of culture he brought to its service, by his thorough mastery of its learning, and by the consummate power, fidelity and skill with which he used them all for the ends of justice, he left us a model of the great lawyer it is our privilege to emulate, though we may never hope to equal.

Resolved, That while his majestic frame is mouldering to dust, in the works he has left behind him, the mature fruits of his great and comprehensive mind and heart, we rejoice to feel the full and highest sense of his last words — "I still live."

Resolved, That a copy of the foregoing Resolutions be presented to the Supreme Judicial Court now in session, with the request that they may be entered upon its records.

Proceedings in the Court of Common Pleas. — In the Common Pleas for Suffolk, then in session, Perkins, Justice, presiding, at the coming in of the Court on Monday morning, October 25, Hon. John C. Park, Attorney for Suffolk county, addressed the court as follows:

May it please your Honors — I rise with your permission to make an announcement and offer a motion. I do this partly at the request of my friends of the Bar, and partly because it is my duty, holding the office, for the time being, of Attorney for the Commonwealth in these courts, to notice an occasion on which the Commonwealth, as such, has suffered an irreparable bereavement.

Daniel Webster, the patriot, the jurist, the statesman, is no more.

I rise to pronounce no panegyric, no eulogy! This is neither the time nor occasion; nor am I the man. When the avalanche has fallen from the mountain-top — when the thunderbolt has cleft the forest oak — deep silence succeeds the shock; and now the public pulse has ceased its throbbings, and holy, silent awe is the loudest oratory. Time will be, when we shall awake to a full realization of the event: and then eloquent lips will pour forth a nation's feelings.

How many thousands sympathize in the emotions of this hour! The news, lightning-winged, has already pervaded the continent. The fisherman on the Banks pauses in his toil to echo back the wail, which reaches him from the shore. The trapper in the valleys of the Rocky Mountains catches it, as it rolls across the prairies. The Industry of the nation feels that it has lost its best friend; and even on the thrones of Europe, the monarchs of the Old World tremble as they learn that that master-spirit, which has wielded a moral power over the destinies of nations, more potent than their armed legions or their diplomatic machinery, now stands with the prophets of old and apostles of truth in humble adoration before the throne of Omnipotence.

Around us — in our very midst — how every thing speaks to us of him! Yonder Monument to Liberty, baptized in the floods of his eloquence; yonder Pilgrim Rock, consecrated by his lips in the spirit of Puritan truth; the very landmarks and boundaries of our land, from the bleak north-east to the sultry south-west, are established under his wise, far-seeing guidance. Not a waterfall or cataract in all New England, rendered useful to mankind by those discreet measures which always met his cordial support,

that did not seem on yesterday's holy morn to have rolled its course seaward with a more subdued and plaintive murmur.

The Indian, when his chief goes on his long pilgrimage to the spirit-land, buries with him his war implements, his tomahawk and arrows. We, of a Christian faith, bury far away from our chief the barbed arrows of political strife and party rancor, and gaze with mournful gratitude on the countless benefits which he has conferred upon us.

Threescore years and ten he has been spared to us. Thirty at least of the number he has been leaving the impress of his gigantic intellect upon every prominent measure which has conducted to our country's advancement and prosperity.

But I forbear. The glorious sun has set. Unclouded to the last, its latest beams were of meridian splendor, and the twilight of good influences which it leaves will endure forever.

May it please your Honor: I feel sure that the Court will concur with the Bar, in believing that these halls of justice, from which we are to miss those eloquent tones, that impressive form, should for a time be left to meditative silence. The old, who have met him in the arena of forensic warfare; the middle-aged, who have lost in him a kind friend and willing counseller; the young, who have sat at his feet and drunk in lessons of deep wisdom from his lips; and even the young, struggling student, who, while he fully realizes the picture of the poet,

> "Haud facile emergunt quorum virtutibus obstat
> Res angusta domi,"

yet revived his drooping spirits with the remembrance of the perseverance and eventual success of the New Hampshire farmer's boy. All, all unite to mourn our loss.

I now move the court, that this court be adjourned for such interval as the proper discharge of our public duties may permit.

To which Judge Perkins responded as follows —

Mr. Attorney and Gentlemen of the Bar: — A great calamity has indeed befallen the nation. A tower of its strength has been removed. To-day Daniel Webster is no longer among the living. The heart of the people is smitten with grief. On all sides and every where we behold the signs of sadness and mourning; and it becomes us also, in the midst of such universal tokens of affliction, to evince our sympathy with these manifestations, and our respect for the name and memory of the deceased; a name which is identified with the Constitution and the Union and history of these States — and a memory which will live so long as that Constitution and Union shall remain, and that history shall continue to be read. In compliance with the request now made, and with my own sentiments of duty and propriety, I shall direct an adjournment of the court.

The court was then adjourned till after the funeral at Marshfield.

The Criminal Term of the Common Pleas for Essex County, was in session at Lawrence, Bishop, J., presiding. At the opening of the Court on Monday morning, Oct. 25th, Stephen H. Phillips, Esq., District Attorney, addressed the court as follows:

Authentic intelligence having been received of the demise of the Hon. Daniel Webster, Secretary under the Federal Government, I deem it a part of my official duty to communicate the fact to the court, and respectfully to suggest the propriety of an immediate adjournment.

Were it merely in deference to the eminent official station of the illustrious deceased, it would seem fitting to pause in our ordinary avocations to reflect upon this dispensation of Providence. But, may it please your Honor, we are apprised of the decease of no ordinary incumbent of that high office. A statesman of great experience and imperial abilities has

passed from the gaze of the nation. A lawyer of profound learning, after having dazzled all the courts of the Union for more than forty years by the brilliancy and power of his forensic achievements, has been called from the arena of earthly ambition to answer at the tribunal of Infinite Wisdom. Could I so far overcome the influences of this occasion, as to obtrude myself too long upon the consideration of the court, I might be betrayed into a recital of the distinguished public and professional services of Mr. Webster. But, Sir, the world knows them by heart, and it will undoubtedly fall to the lot, at a proper time, of some one better qualified than myself to represent to the court the feelings of the bar and of the county which have been suggested by this melancholy intelligence.

Permit, me, therefore, may it please your Honor, in accordance with what I know to be the unanimous sentiment of all in attendance upon this court, to move for its immediate adjournment, in the hope that the day may be devoted to that religious contemplation which this inscrutable decree of the all-wise Providence cannot fail to invite.

Hon. A. Huntington then rose and recalled several interesting reminiscences of Mr. Webster, and moved that it be entered on the records of the court, that the court adjourned out of respect to his memory.

The court stated that the motion was properly made. When an eminent member of the Bar dies, it is customary and fitting that the other lawyers in his locality should pay a becoming tribute to his memory. But where is Daniel Webster's locality? He has none of lesser limits than the whole Union, whose integrity he has preserved against the waves of contending faction. It is eminently proper, from regard not only to Mr. Webster's high official position, but to his eminent professional reputation, that an adjournment should be had at once.

Proceedings in the Supreme Court of Maine. At the Term of the Supreme Court in Hancock County, at Ellsworth, Hon. John Appleton on the Bench, on Saturday, October 30th, at the request of the members of the Bar of that County, Arno Wiswell, Esq., County Attorney, addressed the court as follows —

May it please the Court: On behalf of the Bar of this county and at their request, I arise to call your Honor's attention to the recent melancholy event, which has cast so much gloom and sadness throughout the length and breadth of this great republic. I allude to the death of the Hon. Daniel Webster. A great man has passed from among us, one of the greatest certainly of this age, or of any age of the world's history. Daniel Webster, the sublime orator and statesman, is no more, and a nation mourns.

For nearly forty years, he has largely participated in the councils of our country, and few, if any, have aided so much in guiding its destinies. For nearly the same long period, without a rival, he has stood at the Bar of this Union. His intellectual superiority has not been questioned — he was the mightiest among the mighty.

It does not become me, and it is not my purpose, to pronounce his eulogy. The six splendid volumes of his published orations, speeches and public documents, recently given to the world, are a glorious monument to his fame — such a monument as few men now living will leave behind them.

But his earthly pilgrimage is ended. He has left forever the scenes of his great deeds and his many glorious triumphs. His great heart has ceased to beat, and his spirit now mingles with the throng of the mighty dead who have gone before him.

To which his Honor, Judge Appleton, responded:

The deep feeling which pervades the nation is the best evidence of its high appreciation of the genius and eloquence of that great man, who has

so recently been taken from our midst. From the shores of the Atlantic to those of the Pacific, from the fertile regions of the South, from the broad domains of the West as well as from his own beloved New England, the voice of heartfelt mourning has ascended to heaven at the loss of the great statesman, whose eloquence in times past resounded from one end of this Union to the other. It is the voice, not of a party, mourning for its chosen leader, but of a nation, for its greatest statesman. Within a brief period, the nation has been called to deplore the loss of a Calhoun, whose dialectic skill, whose unrivalled ability and unquestioned integrity, gave him so high a position in the councils of the nation, as well as that of the chivalric son of Kentucky, whose broad and generous statesmanship so pre-eminently endeared him to those whose political sympathies were congenial. And now the last of that triumvirate which so long swayed that august body, of which they were the pride and boast, is no more. Who will aspire to fill those places now vacant? Who will hope to tread with equal footsteps in their path?

Mr. Webster, as a member of that profession common to him and to us, was its most distinguished and brilliant ornament. Trained to the contests of the Bar with such men as Mason and Smith as competitors, he early took a most distinguished rank. Upon the decease of William Pinkney, who then was at the head of the Bar of this Union, and who in the pride of his strength said "that he did not desire to live a moment after the standing he had acquired at the Bar was lost, or even brought into doubt or question," that supremacy, by universal consent, was conceded to the great orator of the North — and never after became a matter of contest. In those great questions of constitutional and international law, discussed in the highest tribunal of the nation, his arguments were unrivalled. They were clear as the crystal stream, strong as an army with banners. But the reputation of the advocate, however distinguished, is fleeting and evanescent. His grave is hardly closed, before darkness rests upon his memory, and his highest efforts are forgotten, or are preserved only by dim and shadowy tradition.

But it has been the good fortune of Mr. Webster to have embalmed his memory in the rich legacies which he has bequeathed to posterity. As an orator in the Senate of the United States, that arena so peculiarly fitted for the display of his vast intellect, he stood confessedly unsurpassed. His stirring eloquence, his matchless logic, the clearness and compactness of his argumentation, place him in the same rank with Demosthenes and Cicero of the remote past, and with Burke and Mirabeau of more recent times. His occasional addresses — the peculiar growth of our institutions, comparatively unknown elsewhere — so full of wisdom, so replete with patriotism, so rich in "thoughts that breathe, and words that burn," will endure, as long as the language in which they were uttered.

The great orator, the enlightened and far-seeing statesman, is no more. The strifes of party, the excitements of the Bar, the magnificent forensic contests of the Senate, the general interests of the country, the international relations of the republic, so fittingly entrusted to his clear and sagacious statesmanship, have ceased to interest him. His words of wisdom and power are forever ended. Neither strength of body, nor vigor of mind, nor the warmth of friendship, nor family affection and love, nor ardent aspirations, nor high station, were of any avail before the inevitable necessity which awaits us all. *Abiit ad plures.* He has gone to the ever-increasing number of the departed. The future with him is in the wisdom and goodness of God. "I still live," was the last utterance which broke the sublime silence of approaching dissolution. With resignation and trust in the Most High, he awaited the fate of our common nature. Day by day, hour by hour, the sands of our glass are passing away, and

when the last hour shall come, as come it must to us all, may it find us prepared and ready, trusting in the infinite mercy of God.

A meeting of the Bar of Penobscot county (the Supreme Court, Mr. Justice Hathaway presiding, being in session at Bangor,) was held on Friday, October 29, when Joseph S. Rowe was called to the chair, and Abbott W. Paine was appointed Secretary. Thornton McGaw, Abraham Sanborn, and Abbott W. Paine, Esqs., were appointed a committee upon resolutions, and reported the following, which were adopted:

Resolved, That the members of the bar have heard with profound sorrow the death of Hon. Daniel Webster, one who by the admission of all stood pre-eminent, above all others of the age, as a lawyer, a statesman, an orator and as A MAN.

Resolved, That as members of the legal profession we feel a just pride in the fact that he, whose exit we now, in common with the whole nation, so deeply mourn, was not only a lawyer, but that in the practice of his profession he found his particular delight, and there laid the foundation of all his other greatness.

Resolved, That his last words, "I still live," are still true. He still lives in the memories and hearts of his fellow-citizens — in the enduring records of his eloquence — in the words of wisdom and counsel that fell from his lips and in his great and bright example.

Resolved, That we sympathize in deep sorrow with the relatives of the deceased — with the few remaining friends of his youth, the numerous friends of his maturer years, and with all who mourn the setting of the great intellectual light of the age.

Voted, That the foregoing resolutions be published in the several papers of the city, and that a copy of the same be forwarded to the family of the deceased.

The same day, Jacob McGaw, Esq., thus addressed the Court:

May it please your Honor — I am invited by my respected friends, the members of the Bar of this county, to present to this honorable court a request, dictated by a sense of the duty that we owe to the Sovereign Disposer of all events, to our country, to this honorable court and to ourselves. Our request is that your Honor would cause this court to be adjourned for such a length of time as to your Honor shall appear proper.

The announcement of the death of the Hon. Daniel Webster, Secretary of State of the United States of America, was in the beginning of this week made through the length and breadth of our land. And the day has now arrived when "all that was mortal of Daniel Webster" is to be committed to the earth. On this day and on this occasion, America may well stop and consider. Her brightest luminary is extinguished. Her whole land is clothed in mourning, and every heart in it is filled with sadness.

While the great man lived, if war was threatened, or any great national calamity seemed impending, that could be averted by human sagacity, all eyes were turned to Daniel Webster, and deliverance through his instrumentality was expected more certainly than from the combined wisdom of all others. I would not forget that our nation has not yet entirely wiped away its tears that have flowed by reason of the death of other great men and eminent patriots, distinguished for intellectual strength and depth of learning. Neither the profound Calhoun, nor the eloquent and ardent Clay, can ever be forgotten, nor will they be remembered without reverence and pride by Americans — but still the fact will remain, that Daniel Webster was most intellectual among the intellectual men of our times — pre-eminently patriotic among patriots — and very learned among the most learned of our countrymen.

I need not refer to the time when Secession raised its dangerous head, nor to his remarks on Foote's Resolution, nor to the settlement made by him of the North-Eastern Boundary Question, which neither the great talents of Jefferson, Madison, Monroe, Adams, Jackson or Van Buren could effect in the long period of half a century, in order to test his intellectual greatness, his statesmanship and patriotism.

Nor is it necessary to cite his eulogy on Adams and Jefferson, his speech at Plymouth, or his very recent, rich and instructive address before the New York Historical Society, to convince you of his deep and thorough scholarship, for every American who has paid some attention to literature knows it already.

But, Sir, while our whole people will this day feel afflicted, and realizes that the chastening hand of the Almighty is upon us, individuals and associations will be more or less affected in proportion to the nearness of their relation to the deceased. It becomes then the privilege as well as the duty of every member of the honorable profession over which your Honor is now here presiding, to mourn, deeply to mourn, over the death of him whose example of industry, whose attainments in all the departments of law, accompanied with unsurpassed elocutionary powers, and most honorable practice, offer the strongest inducements for them to strive to be like him. No lawyer can ever forget how much he, and the nation too, is indebted to the learning, talents and efforts of the deceased, in fixing the stability, rights and dignity of the literary institutions of the country, as exhibited and finally settled in the great case of Dartmouth College.

Among his eminently estimable qualities, one memorable trait was the truly Christian development he exhibited to the law of love. In his intercourse with his brethren of the Bar, as well as in his conflicts in the Senate hall, he DID TO OTHERS AS HE WISHED THEM TO DO BY HIM. He treated his opponents with perfect courteousness, while he met their arguments with all the strength of his unequalled reasoning powers.

And this feeling, as manifested towards those who were the friends of his youth, knows no parallel. They were never forgotten in after years, when changes in their relative position found him at the head of political greatness, and of polished society, while they remained in the humbler walks of life. So long as their honor was untarnished, his kindness towards them remained undiminished.

Well, then, may our nation mourn his death. Patriots, every where, will lament that all that was mortal of Daniel Webster is no more! Science will grieve for his loss, early friends will weep over his memory. And this day will this Bar strive to study his character, and resolve to emulate his greatness and his motives. With these feelings they ask of this honorable court a little time for calm contemplation and for mourning.

To which Judge Hathaway replied: —

Gentlemen of the Bar — It is with unfeigned emotion that I find myself called upon to respond to the sentiments so eloquently announced to me by our learned and honored brother, on this mournful occasion. To those sentiments I do most cordially respond. It is no ordinary occasion. It is the annunciation of the departure of one of the great men of the world, who now belongs to history, in which no other man of this generation will occupy a more gloriously illuminated page.

You will not deem it strange that I should manifest emotion. I was reared from my childhood in the same State in which Daniel Webster was born. While I was yet a school-boy he was on the flood-tide of his great career, and pointed out to me as the exemplar and pattern for honorable emulation and ambition. I have marked and watched him from my childhood to his death, and now we are called upon to do honor to his memory.

In this land of freedom and of large liberty, no man obtains high distinction but through conflict. It is a battle-field for eminence. Competition is an element of mighty importance in elevating those who may be successful in obtaining the prize of honor. Hence no man obtains high distinction but by passing through this ordeal, in which he must, of necessity, be subjected to the rivalries, the envy, the jealousy, and even the malice, ofttimes, of his opponents, but "he who surpasses or subdues mankind must look down on the hate of those below." It is a beautiful manifestation of that vein of goodness which permeates the whole human character — the whole race of mankind — that when a great and good man dies, when death's seal is set upon him, rivalries and jealousies are forgotten, and even the serpent hiss of envy and malice is silent and rebuked, and all gather around him to do honor to his memory. Thus hath it ever been in this country — thus it is now — thus may it ever be. The illustrious dead, "lamented by two hosts, his friends and his enemies."

In the few years past death seems to have had a harvest-time of the great men of the world, cutting down the choicest flowers, and gathering the richest and topmost fruit. Death makes no distinction; his scythe cuts down the tallest cedars of Lebanon with the same inexorable and fatal facility with which it crops the hyssop on the wall.

It is but a brief time since our own gallant Taylor, who had been elected to the highest station his country could bestow, was cut down in the very spring-time of his civic honors, who might, without extravagance, be compared to the great Carthaginian who "almost won imperial Rome." And in connection with his great name it cannot be inappropriate to allude to one of his own profession in our mother country, who but a few days since was gathered to his fathers in a glorious old age — Wellington, the Fabius Maximus of England's warriors, who had the rare good fortune to command the army that vanquished the almost conqueror of the world.

But the death of those of our own profession, and of our own country, touches us more closely. How brief the time since Calhoun, the chivalrous, the intense, the brave, the honest; whose mind was the very Damascus blade of logic, in the fineness of its temper and the keenness of its edge, was cut down in his high career.

And then but a few months past, Clay, the magnificent, the mighty orator, whose patriotism embraced his whole country, whose philanthropy was world-wide as his fame, and of whom it may well be said, he was a true representative of our own great revolutionary Henry, who was truly called by one of England's greatest poets, "Henry the forest-born Demosthenes, whose thunder shook the Philip of the seas."

And now we are called upon to lament the death of Webster, the last of that great triumvirate, who were all Cæsars, and he *Primus inter pares*, what shall I say of him? This is not the time, or the place for his eulogy. He has departed in the fulness of his honors and his years. He has set a glorious example to the members of his profession in the attainment of the highest excellence by the severest toil; and all things of choice value cost labor. He is a loss to that profession, for nothing is more true than what was said by Lord Coke of Littleton: "Certain it is, that when a great learned man, who is long in making, dieth, much learning dieth with him." He was distinguished in that profession beyond his fellows. He was always foremost, as the lawyer and orator, as the statesman, as the diplomatist, as the man. In the whole gathering together and fitting up of his mighty, intellectual character, he was "*Totus teres atque rotundus.*" Or as he who always spoke directly to the purpose, "*Brevis densus et semper instans,*" recently expressed the same truth in his own vernacular,

when defending himself from the aspersions of his opponents, in the proud and glorious consciousness of truth and rectitude, he uttered those memorable words, "God made me a whole man." He was a whole man; such he lived; such he died. Peace to his remains; honor to his memory.

Our orient star hath run his course, the vesper bell has rung; the shadows of the night of death have gathered around him, and veiled him from our earthly view forever.[1]

WRITS OF ERROR IN NEW YORK IN FAVOR OF THE PROSECUTION IN CRIMINAL CASES.—There has been considerable discussion recently in New York city, in relation to a law giving to The People writs of error to review judgments rendered in favor of defendants upon indictments, for any criminal offence, except where they have been acquitted by the jury. Two men of the name of Clarke and Sullivan had severally been convicted of murder, in the Court of Oyer and Terminer for the City and County of New York. Exceptions to the ruling of the Judge were taken to the Supreme Court for the first district, embracing the City of New York, and after full argument were allowed, and a new trial granted. Under the new law, a writ of error was taken out in behalf of the people, to the Court of Appeals, which, after full discussion, reversed the decision of the Supreme Court, and the case was remanded to the Supreme Court, with an order upon the judges to pass sentence upon the prisoners, and to appoint a day for its execution. Thus the anomalous case was presented, of a Judge deciding that the prisoners should have a new trial, to which they had a right, and while he was still of the same opinion, passing sentence of death upon the same prisoners. Such a proceeding necessarily excited comment on the part of the press; and Judge Roosevelt, in his opinion, indicated the extent and depth of his feelings upon the occasion. So much was written and spoken, that the District Attorney felt himself called upon to vindicate the law. After the publication of his card, we think the only question that can arise, is upon the fitness and expediency of such a law, in favor of which the New York Legislature has already decided. We give the opinion of Judge Roosevelt and the card of Mr. Blunt in full.

Opinion of Judge Roosevelt.

"I sign this warrant with deep reluctance. The case presents the extraordinary, and, I think, until now, unprecedented spectacle of a judicial tribunal, in a matter of life and death, called upon to pronounce judgment upon a human being, against its own sense of both law and right.

When this case was before us for review, on behalf of the prisoner, we decided, after full argument and careful deliberation, that he was entitled to a new trial — for that decision we gave our reasons at length — and we unanimously concurred in the result.

As the law stood when the case was argued before us, our decision being in favor of the accused, had it been pronounced, it would have been confessedly beyond the reach of appeal, and would have created a *quasi* vested right to the new trial which we ordered.

On the 22d of March, however, the Legislature, for reasons not generally understood, were induced, while the case was under advisement, to pass an act contrary, as I conceive, to the whole spirit of our penal jurisprudence, allowing a writ of error, and that even retrospectively, against a prisoner.

Such an act, if not literally and technically an *ex post facto* law, within the meaning of the prohibition contained in the Constitution of the United

[1] The proceedings in New York and other places will be given in our next number.

States, approaches it in spirit and effect, so nearly, as to be scarcely distinguishable from that universally condemned species of legislation.

Under that act, however, whether just or unjust, a writ of error was issued against the prisoner, and the judgment of this court reversed,—the appellate tribunal deciding that killing, 'with an intent to kill formed on the instant of striking the blow,' is the same as if 'perpetrated from a premeditated design to effect the death of the person killed.'

The latter is the language of the Legislature in the revised statutes on the subject of murder—the former is the language of the Judiciary. Both are held to have the same meaning. And on that ground the Court of Appeals decide that the prisoner's conviction of murder was according to law, and, whatever may be our individual opinions, that decision must be carried into effect by this court.

We have accordingly, as required by law, issued a habeas corpus to bring the prisoner before this court, and 'have inquired into the facts and circumstances,' as the statute directs. And the question arises whether, against our own strong convictions, we shall now sign a warrant for his execution. The statute provides that we shall do so, 'if no legal reason exists against the execution of the sentence.'

Who then is to judge of, and be responsible for these reasons. We have already said, and have so decided, that in our opinion, (an opinion which remains unchanged) the sentence of death, as for premeditated murder, ought not, without another trial, to be executed. We gave at the time what then seemed to us, and still seem, good legal reasons. The Court of Appeals says they are not.

And yet the statute obviously contemplates that we must judge of them at the time of signing the warrant, and thus necessarily, for the second time, pass upon their validity. Such is the dilemma, in which the peculiar, and, as I conceive, hasty action of the last Legislature, has involved us.

While giving an appeal contrary to all former usage in capital cases, in favor of the strong against the weak, instead of carrying out the principle and throwing the whole responsibility on the Appellate Court, it has left unrepealed the provision in the revised statutes, already referred to, imposing upon this court, if the construction contended for be correct, the duty of hearing and deciding upon the reasons before ordering the execution, and yet ordering it at all events, whether the reasons, in our opinion, be valid or invalid.

It will be said, perhaps, that in judging of the reasons against the execution of the sentence, we are bound to accept implicitly the exposition of the Court of Appeals. This may be so. As a general rule it is so. Difficulties, however, in the case before us, have suggested themselves to my mind, in the application of the rule, creating the most painful uncertainty.

In civil cases, the law provides that the Court of Appeals may not only 'examine' all alleged errors in the Supreme Court, but may also 'reverse or affirm the judgment of that court, or give such other judgment as the law may require;' and that the record shall then be remitted to the Supreme Court, 'where such other proceedings shall be had as may be necessary to carry such judgment into effect.' (2 R. S. 166.)

The act of last session, departing from these general provisions or overlooking their existence, simply declares that 'Where a judgment has been rendered in the Supreme Court in favor of any defendant charged with a criminal offence,' the Court of Appeals shall have full power to review, by writ of error in behalf of the people, any such judgment.'

It has been suggested, and the suggestion is not without plausibility,

that the omission by the Legislature was intentional and altogether proper; that they intended merely to confer the power of review, that being sufficient to settle the meaning of the law for the future, and secure uniformity of decision.

Does the term 'review,' it is asked, carry with it, by necessary implication, the power to reverse and render a new judgment, and to send a mandate to the court below to execute such judgment? If so, why were all those superfluous provisions inserted in the general law as contained in the revised statutes?

A new Legislature is soon to assemble. They can declare, and can do so authoritatively, what shall be the construction of the act of the last session; and what is still more important, they can, with equal effect, also declare, whether, in the judgment of the people of this State, the killing of a human being unlawfully, but with an intent to kill formed only on the instant of striking the blow, is a crime of the same character, to be embraced under the same name, and deserving of the same punishment as premeditated murder.

Ample time, therefore, should be allowed to take the sense of that body on the subject. The whole eight weeks, the maximum period prescribed by the Revised Statutes, should, in that view, be given to the prisoners, in fixing the day of execution. In addition to which, in a case so peculiar in its circumstances, I conceive it a duty of the members of this court individually, if not officially, to bring the matter to the notice of the Executive, as the officer intrusted by the Constitution with not only the power of commuting punishments, but of recommending to the Legislature such matters he may judge expedient."

Mr. Blunt's Card.

"To the Public. — Desirous at all times of avoiding a public discussion of matters purely of a legal nature, except before that forum which the Constitution and the laws have provided for the hearing and settlement of such questions, I am compelled by a sense of duty to that community whose servant I am, to correct the many misapprehensions which have been industriously circulated, (growing out of the recent cases of Clark and Sullivan,) in regard to the law allowing writs of error to the people in criminal cases. By one paper of high and acknowledged respectability it has been designated 'a very cruel and improper law,' a law 'giving the right to the prosecuting attorney to appeal from the verdict of a jury which had acquitted a man after a trial for manslaughter, murder, or any other crime.' It is spoken of as having been 'smuggled through the Legislature,' as being utterly anomalous, having no precedent in any code of jurisprudence that has obtained among civilized nations.' It is also in the same journal represented as having been 'passed not only after the commission of the crime, but after the judgment of the Supreme Court granted the prisoners new trials.' In another paper of equal character, it is called a 'most extraordinary' act, and in the published opinion of one of the Judges of the Supreme Court, it is classed as in the nature of an *ex post facto* law.

The law itself furnishes the best refutation to a portion of these charges, and the history of its origin, and the causes which led thereto, may not be uninteresting. The law is as follows:

'Writs of error to review any judgment rendered in favor of any defendant upon any indictment for any criminal offence, except where such defendant shall have been acquitted by a jury, may be brought on behalf of the people of this State by the District Attorney of the County where such judgment shall be rendered, upon the same being allowed by a Justice of the Supreme Court; and the Court of Appeals shall have full

power to review, by writ of error in behalf of the people, any such judgment rendered in the Supreme Court in favor of any defendant charged with a criminal offence.'

A draft of this law was prepared some time in December, 1851, before Judge Roosevelt had taken his seat on the bench, without the slightest reference to the cases of Clark and Sullivan, which, in fact, were not argued until the February term, 1852, and was forwarded to Albany in January, shortly after the meeting of the Legislature. It was first presented in the Senate, pursuant to previous notice, by Mr. Taber, of Albany, (than whom a purer and more benevolent man is not to be found,) on the 21st February, was read the first and second times by unanimous consent, and referred to the Committee on the Judiciary. On the 25th February, Judge Vanderbilt, from the Committee on the Judiciary, reported in favor of its passage, and it was committed to the Committee of the Whole. There it remained until the 6th of March, when, by unanimous consent, it was ordered to a third reading. On the 8th of March, it was reported by Mr. Clark as correctly engrossed; and on the 13th of March it was read a third time, and unanimously passed the Senate. On the 20th of March, by unanimous consent, it was taken up in the House, unanimously amended and ordered to a third reading, read a third time, and returned to the Senate. On the 22d of March it was again taken up in the Senate, the amendment unanimously concurred in, and the bill returned to the Assembly; and having received the Governor's signature, became a law. So much for the mode and manner in which the law was 'smuggled through the Legislature.' Of the causes which led to its passage, I proceed to speak.

Prior to the decision of the Court of Appeals, in the case of *The People* v. *Corning*, (2 Coms. p. 1,) the right to bring writs of error in behalf of the people in criminal cases, had always been exercised in this State, since the Revised Statutes of 1830; and the Court of Appeals, in the case of The *People* v. *Adams*, (1 Coms. p. 173,) had themselves sanctioned the practice by affirming a judgment of the Supreme Court, reversing, at the instance of the people, a judgment in favor of the defendant, in the New York Sessions. The right had repeatedly been exercised in England, and I believe was never there questioned. In Corning's case, however, the question was distinctly raised, both in the Supreme Court and in the Court of Appeals, — the former sustaining the right; and the latter, after twenty years' practice to the contrary, determining against the right. Such being the decision of the court of last resort, it was apparent that unless legislative aid was furnished, the public, in matters of the most vital importance, were at the mercy of courts of limited and inferior jurisdiction; and however erroneous in point of law their decisions might be, if against the people, there was no remedy. This was strikingly illustrated in the case of *The People* v. *Phelps*, indicted in the Ontario County Sessions for forgery, in passing counterfeit notes of some of the associated banks, the indictment being demurred to on the ground that the act authorizing these banks was unconstitutional; and on argument the demurrer was sustained; thus determining it was no crime in that county to pass counterfeit notes of the banks incorporated under the general law.

Carefully framed, so as to preclude the slightest constitutional objection, not even conferring upon the people the right to a 'bill of exceptions,' and specially excepting from its provisions cases of acquittal by a jury, this much abused law was passed on the 22d of March, 1852. In the month of February preceding, the cases of Clark and Sullivan were argued, but not decided until May term, nearly two months after the passage of the law.

Will any lawyer of fair repute inform me what vested right the prisoner had acquired before the judgment of the Supreme Court was pronounced. Up to that moment the judgment of the Oyer and Terminer was in full force and effect, the execution of the sentence alone being stayed. As to its being an *ex post facto* law, I can only say, that until the definition of those words as furnished by Blackstone, and expounded by the Supreme Court of the United States, shall be altered by some more competent authority, I shall not attempt to defend the law in question from this imputation. Nor was the law retroactive, but the reverse; and although the right to pass retroactive laws is fully settled as within the power of the State Legislature to pass, if they please, I am one of those who, admitting the power, doubt the propriety of its exercise.

Such is a plain, unvarnished history of the law in question, the propriety, constitutionality, and application of which to the cases of Clark and Sullivan, were fully discussed before and decided by the Court of Appeals, on a motion to dismiss the writs of error.

Of the necessity of some paramount tribunal, possessing the power to finally determine what the law is, amid the conflicting decisions of courts of concurrent jurisdiction, I leave your readers and the public to determine. I have myself been trained to bow with deference to the decisions of our courts, until reversed by a higher tribunal, and I commend to those who set up the standard of their own opinion against the judgment of the constituted tribunals of the land, the apposite remarks of Lord Bacon, —

De fide et officio judicis non recipitur questio: sed de scientia, sive error sit juris aut facti.

No question is to be made of the honor and duty of a judge; but of his knowledge, whether he is mistaken as to the law or facts of the case, it may. N. Bowditch Blunt."

Manslaughter by Fast Driving. — At the October Term of the Supreme Court of Maine for Hancock County, Thomas Jefferson Frazier was indicted and tried for manslaughter. The facts proved by the government were, that on Sunday, the eighth day of August last, soon after the commencement of the afternoon service, the prisoner rode up to a meeting-house with a horse and wagon, but did not enter the building; that at the close of the same service, when the congregation was separating, he took into the wagon two females, residing about a quarter of a mile distant, to convey them to their homes; that this time he commenced driving the horse with such fury and recklessness that it attracted notice, and Frazier was expostulated with by at least five persons, and warned of the probable effect of driving so fast on a crowded thoroughfare; that he replied with an oath that he should drive as fast as he pleased; that after leaving his his female friends safely at their homes, he returned over the same ground, but was stopped by a person who had taken a stake out of the ground to arrest his progress; that he then, to use the witness's language, appeared "humbled," and stated that he had no intention of injuring any one, although he had already slightly hurt one and nearly done personal damage to two others; that upon again starting he drove as furiously as ever, whipping his horse to its utmost speed; that he had gone but a few rods farther, when he ran against Almira Townsend, one of the shafts of the wagon striking her in the stomach and causing almost instant death.

It was urged for the defence, that there was no malice; that the speed was not unusual for a high-spirited horse; and that some disarrangement of the harness caused Frazier to lose control of the animal. We do not know the ruling of the court, but the jury found the prisoner guilty, and he was sentenced to six months' imprisonment in the common jail.

Rhode Island Liquor Law unconstitutional. — In the Circuit Court of the United States for the District of Rhode Island, December 30th, Judge Pitman of the District Court gave an opinion, and also read the opinion of Mr. Justice Curtis in the case of *William H. Greene* v. *Briggs et al.*, in which the Rhode Island Liquor Law was decided to be in violation of the Constitution of Rhode Island. The following abstract of the opinion is given by the Providence Journal.

"The action was replevin for certain spirituous liquors committed to the defendants, as constables of the city of Providence, by an order of the Court of Magistrates, to be destroyed according to the provisions of the 'Act for the suppression of Drinking-houses and Tippling-shops.' The adjudication of the case involved important questions, arising under the Constitution and laws of the State. Judge Curtis, in giving his opinion, cited the 10th and 15th sections of Article 1st of the State Constitution, which are as follows:

Sec. 10. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself, nor shall he be deprived of life, liberty or property, unless by the judgment of his peers or the law of the land.

Sec. 15. The right of trial by jury shall remain inviolate.

He said the meaning of these two clauses was, that 'in civil causes a trial by jury is to be had in those classes of cases in which it had been practised, down to the time when the Constitution was framed, and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the Legislature, without impairing the right itself. But in all criminal cases the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.'

After stating the substance of sections 11, 12 and 13, of the Act for the suppression of Drinking-houses and Tippling-shops, he stated that they were in conflict with the Constitution in several particulars. The conditions of appeal were an infraction of the right to trial by jury. In order to obtain a trial by jury, the party must give security in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs, which might be adjudged against him, and must subject himself to the hazard of having the fine inflicted by the Justice of the Peace increased five-fold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons. In the constitutional provision that no person shall be deprived of 'life, liberty or property, unless by the judgment of his peers or the law of the land,' the phrase 'the law of the land' had been construed to mean by 'due process of law.'

This provision of the Act also conflicted with sect. 14 of the Constitution, 'Every man being presumed innocent, until he is pronounced guilty by law, no act of security which is not necessary to secure an accused person shall be permitted.' The Act also conflicted with the clause requiring that the accused should be informed of 'the nature and cause of the accusation.' This Act did not require that any particular person should be charged, and in the case at bar the complaint charged no one. The process was defective also for want of certainty in specifying the liquors to be seized. It was also defective in not charging fully the crime upon which trial was to be had. The accused had not only an absolute right to a trial by jury, but also a right to be so charged, that when that trial takes place the jury should pass upon the whole charge. But the Act provided in the

case of an appeal, where the liquors seized shall exceed five gallons, if the final decision shall be against the appellant, he shall be adjudged a 'common seller,' and be sentenced as such, so that he might be convicted of this higher offence without being charged with it, and without a trial by jury of one of the facts essential to constitute it. But even if the proceedings against the person and the property were reparable, and the only result was a forfeiture of the property, the complaint would be still so deficient in the requisite certainty, as to be bad for that cause.

He consequently held the order of forfeiture invalid. First, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had nor could have, a trial by jury, without submitting to conditions which the Legislature had no constitutional power to impose. The Court also thought the order not simply voidable, but absolutely void; the magistrates having no jurisdiction over the proceedings. And they gave judgment for the plaintiff on the demurrer, with nominal damages."

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF LOUISIANA. By MERRITT M. ROBINSON. 12 Vols. New Orleans: Published by E. Johns & Co.

THESE volumes embrace the cases decided in the Supreme Court of Louisiana from 1841 to 1846, inclusive, during the whole of which period the distinguished jurist Hon. François Xavier Martin presided over the court. The volumes are handsomely printed, and will be a valuable addition to the libraries of those who practise where the common law prevails. The increasing commerce of New Orleans with the cities upon the seaboard, multiplies questions growing out of commercial transactions, and makes it more and more necessary for the lawyer here to keep himself acquainted with the law in Louisiana. The extensive foreign commerce of the State also brings various important cases before her courts. Although Louisiana has retained the civil law as the basis of her jurisprudence, the principles of the common law in relation to commercial transactions and to rules of evidence, have been adopted. The Judges of the courts, familiar with the languages, and jurisprudence of continental Europe, are peculiarly fitted for the settlement of commercial questions, and their decisions in the volumes before us are rich mines of wealth to the commercial lawyer. In the great department of the Conflict of Laws, also the decisions of the Louisiana courts have always commanded the respect of jurists. We commend these volumes to the careful attention of our readers.

THE REVISED STATUTES OF THE STATE OF NEW YORK, as altered by subsequent legislation; together with the unrepealed statutory provisions of a general nature passed from the time of the revision to the close of the Second Session of the Legislature in 1851. Arranged in the manner of the Revised Statutes. To which are added, all Acts of general interest passed during the Session of 1852, with references to judicial decisions in relation to their provisions, and explanatory notes. Prepared by HIRAM DENIO and WILLIAM TRACY, Counsellors at Law. In two volumes. Vol. I. pp. 1293. Containing the first eighteen chapters of the first part of the Revised Statutes, and the general laws

connected with them, from the revision to the close of 1851. Vol. II. pp. 1126. Containing the nineteenth and twentieth chapters of the first part, and the second, third, and fourth parts of the Revised Statutes, and the general laws connected with them, from the revision to the close of the Session of 1851, and the laws of general interest passed in 1852. Albany: Gould, Banks & Co. 475 Broadway. New York: Banks, Gould & Co. 144 Nassau Street. 1852.

The first edition of these Revised Statutes was published in 1829, under the editorial supervision of John Duer, Benjamin F. Butler, and John C. Spencer. The present is the fourth edition; and the extended title-page, which we print in full, gives a general idea of the nature and extent of the contents of the volumes, and the plan of the work. The certificate of the Secretary of State, prefixed to the first volume, authenticates the volumes. The decisions of the several courts of the State, relative to the various provisions both of the original text and of the subsequent laws incorporated in it, are referred to in marginal notes, and are stated neatly and concisely. The index to the work has been revised, and is apparently sufficiently full.

COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS. By JOEL PRENTISS BISHOP. 1 Vol. 8vo. pp. 702. Boston: Little, Brown & Co. London: William Maxwell. 1852.

This work is a very valuable addition to our legal literature. Such an American book was much wanted, and the author has accomplished his work in a manner highly creditable to him. The subject is one of importance, and, without the aid of any thorough American treatise upon it, and with a real or apparent conflict of authorities and opinions upon important questions involved in it, "to draw from the decided cases such rules as may be followed in future cases," and prepare such a work as was wanted by the American bar, was surely no light task. But the author has grappled with his subject with zeal and earnestness, and has ably and successfully completed his undertaking. The general plan of the work is judicious, and the arrangement of the matter is clear and convenient for reference. The author does not content himself with a mere statement of principles and decisions, but explains and illustrates the principles by examples, and states the facts of the cases referred to, in a manner calculated to arrest the attention and fix the decision in the mind of the reader. He does not present merely the result of decided cases, but introduces enough of the opinions and decisions themselves, to exhibit fully and clearly the reasons upon which they are founded. There is a full and complete citation of English and American cases, and it is quite manifest that the cases cited have been fully and carefully examined, and are well understood. The book derives value from the discussion of difficult and important questions in regard to which there have been different and conflicting opinions. These discussions are ably conducted, and are marked by just discrimination and sound judgment, and afford much instruction. The two first chapters, composing the first book, in which are considered "The fountains of matrimonial law," are particularly interesting and instructive, but the work throughout manifests careful and thorough research, and exhibits a large amount of useful and important learning.

When the preparation of this work was commenced, there was no American treatise on the subject, and there is at this time no other American book but that of Mr. Page "relating to the subject of decisions in Ohio, Indiana and Michigan," and there is no similar English work which meets the wants of an American lawyer. This work must be a valuable

and acceptable offering to the legal profession, and is well entitled to a more particular and extended notice than we are able to give of it at this time.

The List of New Books received, and of new Legal Publications, are crowded out of this number.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, C. F.	West Cambridge,	Nov. 20,	Bradford Russell.
Abbott, Joseph B.	Cambridge,	" 20,	Bradford Russell.
Baker, Eliphalet	Roxbury,	" 23,	William S. Morton.
Bartlett, Charles et al.	Roxbury,	" 5,	Frederic H. Allen.
Bemis, Lewis S.	Shutesbury,	" 5,	D. W. Alvord.
Bowers, Cyrus R.	Boston,	" 6,	Frederic H. Allen.
Bryant, Thomas G.	Watertown,	" 6,	Bradford Russell.
Bullard, Daniel W.	Roxbury,	" 27,	Jona. P. Bishop.
Carter, J. Thomas	Holliston,	" 18,	Asa F. Lawrence.
Chamberlain, Silas	Randolph,	" 9,	Jona. P. Bishop.
Chandler, Benjamin Jr.	Boston,	" 10,	Frederic H. Allen.
Cheney, Joseph	Milford,	" 15,	Henry Chapin.
Coffin, Gorham et al.	Nantucket,	" 29,	George Cobb.
Collins, Joseph W.	Fairhaven,	" 5,	E. P. Hathaway.
Collins, Marshall	Milford,	" 5,	Allyn Weston.
Day, Francis et al.	Upton,	" 9,	Henry Chapin.
Denison, William	Tyringham,	" 29,	J. E. Field.
Doman, Leonard	Stoughton,	" 6,	Jona. P. Bishop.
Farnsworth, John C.	Boston,	" 5,	Frederic H. Allen.
Fosket, Joel	Adams,	" 6,	Thomas Robinson.
Frye, Andrew L.	Andover,	" 30,	Daniel Saunders, Jr.
Gardner, Symmes et al.	Roxbury,	" 5,	Frederic H. Allen.
Garfield, Joel	New Braintree,	" 25,	Charles Brimblecom.
Goff, Henry	Andover,	" 23,	Daniel Saunders, Jr.
Gould, Richard et al.	Chatham,	Dec. 9,	C. B. H. Fessenden.
Harwood, Stillman P. et al.	Chatham,	" 9,	C. B. H. Fessenden.
Hastings, Emory	Orange,	Nov. 6,	D. W. Alvord.
Hollis, John A.	Braintree,	" 5,	William S. Morton.
Homer, Francis H. P.	Boston,	" 3,	Frederic H. Allen.
Huckins, Nelson	Brewster,	Dec. 9,	C. B. H. Fessenden.
Jenkins, Luther	Reading,	Nov. 9,	S. P. Adams.
Lentnell, J. V.	Acton,	" 8,	Bradford Russell.
Look, Orrick	Boston,	" 3,	Frederic H. Allen.
Ludden, Franklin	Northampton,	" 1,	Haynes H. Chilson.
Mitchell, Charles et al.	Nantucket,	" 29,	George Cobb.
Newcomb, Geo. of the firm of C. O. Newcomb & Co.	Braintree,	" 15,	Jona. P. Bishop.
Noyes, Charles M. et al.	Newbury,	" 1,	Daniel Saunders, Jr.
Nute, Charles P.	Gloucester,	" 26,	John G. King.
Peck, Earl	Worcester,	" 12,	Henry Chapin.
Pierce, Moses	Boston,	Nov. 9,	Frederic H. Allen.
Pratt, Joseph	Boston,	" 10,	Frederic H. Allen.
Proctor, Daniel Jr.	Chelmsford,	Oct. 13,	S. P. Adams.
Robbins, James B. et al.	Upton,	Nov. 9,	Henry Chapin.
Rogers, Elijah P. et al.	Newbury,	" 1,	Daniel Saunders, Jr.
Sampson, Miles Jr.	Duxbury,	" 10,	Asa F. Lawrence.
Savage, Jacob S.	Boston,	" 5,	Frederic H. Allen.
Smith, William	Framingham,	" 22,	Asa F. Lawrence.
Stearns, Charles B.	Andover,	" 22,	Daniel Saunders, Jr.
Stearns, L. W. and Brother	Adams,	" 6,	Thomas Robinson.
Tyler, Daniel L.	Lowell,	Oct. 25,	S. P. Adams.
Wadsworth, Ira	Cambridge,	Nov. 8,	Bradford Russell.
Walch, Stephen	Lowell,	" 30,	S. P. Adams.
Washburn, Tobias W.	Cambridge,	" 6,	Asa F. Lawrence.
White, William	Danvers,	" 12,	John G. King.
Willis, Loren	Norton,	" 8,	E. P. Hathaway.
Woodbury, John	Lowell,	" 17,	S. P. Adams.
Woods, Alonzo	Warren,	" 1,	Henry Chapin.
Work, William T.	Lynn,	" 10,	John G. King.
Young, William	Chelsea,	" 19,	Frederic H. Allen.